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CONVEYANCER'S NOTEBOOK

Mr. JOE BROOK RICHARDSON, M.A., LL.B., died on April 12, 1951, in his sixty-ninth year.

He was called to the Bar by the Middle Temple in January, 1908, after having been awarded the studentship and Certificate of Honour by the Council of Legal Education.

He was for many years Examiner in Equity to the Council of Legal Education, and was the author and editor of several legal publications the best known of which is probably the current edition of *Prideaux's Precedents in Conveyancing*. He was also a leading authority on the Acts relating to Agriculture.

Compulsory purchase—method of valuation.—For a variety of reasons the practice of compulsory purchase, or purchase under threat of compulsory purchase order, is rapidly increasing. This can give rise to very troublesome questions of valuation. In the main these are questions for a valuer and not a lawyer since they turn very often on other local sales and so on. Nevertheless, there are a number of appeals to the Lands Tribunal, reports of which appear in the Planning and Compensation Reports. This tribunal is in theory a " hybrid ", that is partly legal and partly lay, but in practice it is frequently a lay tribunal. However, this tribunal is laying down quite a number of " ideas " on the questions to be taken into account where assessing compensation. Our attention was particularly attracted the other day to *Huggett and Huggett* v. *Leicester Corpn.*, 1 P. & C. R. 385, where Mr. C. H. Bailey, B.Sc., M.I.C.E., F.R.I.C.S., decided that a war-damaged vacant

plot, which had been used primarily as a hostel for university students, should not be valued as having a use for that purpose (notwithstanding the clear right to reinstate under the General Development Order, 1950, cl. xi., and without payment of development charge) for a number of reasons, including the one that the university was taking steps to provide such accommodation. In effect, then, the " value " of this use destroyed by war damage was ruled out. It should be added that a value payment had been made, because otherwise the special provisions of the Act might have had some effect.

Our point, however, in mentioning this case was not to criticise the decision, but to indicate that the Lands Tribunal is in danger of building up a set of rules having something like the effect of law. We express it in this fashion because we do not think that expressions of opinion on the effect of the Act by the Lands Tribunal nor opinions upon the method of valuation can have legal effect, and particularly with regard to the latter they cannot be interpreted in quite the same way as legal decisions. They present a grave problem to the lawyer because he cannot carry them in his head, even if he has time to read them, and they defy adequate indexing on legal principles. Nevertheless, the conveyancer will, we fear, have to learn his way round them unless he is to hand over yet another branch of learning to a cognate profession in the same way as income tax and death duties has so largely passed to accountants. It may be that it will become imperative that this should happen since a lawyer can even less become a valuer than he can an accountant. But it will have serious repercussions on the law as well as on the profession. This can easily be seen by comparing the elaborate judgments in the Inner House of the Court of Session in *Sinclair-Lockhart* v. *Central Land Board* (noted *post*, p. 190) with the kind of reasoning given in the reports of the Lands Tribunal. This is not a criticism of the members of the Lands Tribunal, because their function and training (speaking generally) are different.

The problem of planning permissions is something like this, too, since the Ministry publish its bulletin of selected decisions. In our opinion, however, the lawyer is less concerned here, and certainly the decisions published are easier to follow and index and involve more fact and less reason. The time will come when they, too, will require analysis and classification, but it is thought that planning ideas change so much that " precedent " in the long run is not going to provide much guide.

A correspondent writes as follows:—

"In 1948 we had occasion to prepare a Tenancy Agreement and used the precedent on page 369 of Volume 12 of *The Conveyancer*.

The Landlords (the owners in fee simple of the Farm) are sand and gravel merchants, and since the date of the Agreement they have entered upon certain parts of the farm without notice for the purpose of working the sand and gravel deposits. The Tenancy Agreement contains an exception and reservation of mines and minerals with power to work the same as set out on page 370 of the said volume.

By virtue of the sand and gravel workings, the surface of the land is naturally disturbed, and from past experience the Landlords state that they are unable to restore the surface until a period of from three to five years has elapsed. Even if the Tenant re-enters upon the land restored after that period has elapsed, it will be "poor" land for another five years or so.

In the past the Landlords have paid to the Tenant compensation for damage done, in accordance with the terms of the Agreement, and such compensation has been agreed between their respective Valuers.

The Tenant has recently claimed that in addition to the compensation to which he is entitled under the Agreement, he is also entitled to compensation for disturbance and for an away-going crop under the provisions of the Agricultural Holdings Act, 1948. He also claimed that since there was nothing in the Agreement requiring Notice from the Landlords prior to their entering upon the Farm or any part thereof for the purpose of working the minerals etc., then the provision as to mines and minerals contained in the Agreement was void since it had the effect of depriving the Tenant of his claim to compensation under the said Act (s. 65 (1) of the 1948 Act. *Re Disraeli Agreement*, [1938] 4 All E. R. 658; *Coates and Others* v. *Diment*, [1951] 1 All E. R. 890).

We contended that the Tenant was not being required to deliver up possession of anything demised to him and was only being required to do what the Agreement allows, *i.e.*, to permit the Landlords to enter on the Farm for the purpose of working the minerals, etc., and that he was *not* being required to quit an agricultural holding.

The matter has now been compromised, but we are still in some doubt as to the position should the matter arise again in the future.

It occurs to us that it may be wiser to amend the Precedent so as to require the Landlords to give say three months' Notice in

Writing of their intention to enter upon the Farm for the purpose of working the minerals, etc. This would then give to the Tenant an opportunity of claiming compensation under the Act.

However, we should be glad to have your comments, as we have no desire to make a free gift of compensation under the Act to a Tenant, if the true position is in accordance with Paragraph six above."

Mr. Muir Watt, who drafted the form, replies as follows:—

"I agree with the view expressed by your correspondents in the sixth paragraph of their letter, where they say that there is no question of the tenant being required to quit an agricultural holding and that therefore the decisions in *Re Disraeli* and *Coates* v. *Diment* do not apply. The minerals are reserved by the tenancy agreement and the right to enter and work them is not to my mind equivalent to a right to resume possession of part of an agricultural holding. I do not think therefore that it is necessary to amend the precedent so as to require the landlords to give, say, three months' notice in writing of their intention to enter upon the holding for the purpose of working the minerals."

NOTICE OF CONDITION AND IMPLIED COVENANTS

By E. O. Walford, LL.D., Solicitor

It has for many years past been the practice to incorporate, by reference to standard Conditions of Sale or otherwise, in a contract for the sale of leasehold property a provision that the purchaser shall purchase with notice of the condition of the property and shall take the property as it is, or words to that effect. It has certainly not been the general practice to qualify the covenants implied by an assignment by the vendor as beneficial owner. Having personally observed the damping effect of a provision in the draft contract that the covenants implied by an assignment by the vendor "as beneficial owner" shall be expressed to be qualified so as to exclude any covenant by the vendor that all the covenants, conditions and agreements contained in the lease and on the part of the lessee to be observed and performed have in fact been so observed and performed, I came to the conclusion that it was undesirable to attempt to be wiser than others, and gave up the unequal struggle. It was comforting to feel that a purchaser who had agreed to take the property in its present condition would hesitate to rely upon an implied covenant by which he was put into a better position than that for which he had contracted. It was also improbable that a solicitor who adopted the usual form of contract for sale of leasehold premises and later, when perusing the draft assignment, accepted the common form precedent in order to avoid forcing his client into a lengthy argument or even into proceedings concerning the justification of a provision not normally inserted in assignments of leaseholds could be held to be liable to his client in negligence. One was, however, left with the uneasy feeling that it was illogical that a vendor should give a covenant that all the lessee's obligations had been performed and observed when it was well known to both parties that they had not.

The decision in *Butler* v. *Mountview Estates, Ltd.*, [1951] 1 All E. R. 693, resolves at least some of the doubts concerning the ultimate effect of a contract under which a purchaser agrees to take a dilapidated property as it is, followed by an assignment which implies (*inter alia*) a covenant that the vendor has kept the property in repair. In *Butler's Case* the sale of a leasehold property was effected by a contract which incorporated the Law Society's

Conditions of Sale (1934 ed.). Under Condition 17 (5) of those conditions a purchaser is deemed to purchase "with full notice of the actual state and condition of the property, whether as to quantity, state of repair, means of access, enjoyment of light and air or otherwise howsoever" (whatever those last three words may mean) and is to "take the same as it stands".

A BOLD PURCHASER

Having purchased the property under those conditions it seems that the purchaser was by no means minded to take the property as it was. In due course he sought to recover the cost of putting the premises into a better condition than they were at the date of the sale, relying upon the covenant by the vendor implied in a conveyance by a vendor as beneficial owner by the Law of Property Act, 1925, s. 76 (1) (*b*), and Sched. II, Part II, to the effect (*inter alia*) that all the lessee's covenants had been performed up to the date of the assignment.

MERGER

A very curious feature of the defence is that the vendor did not seek rectification of the assignment to accord with the contract. Whether that was due to the belief of counsel that the contract had merged in the conveyance or to some other belief, the report does not disclose. It is true that as a general proposition where a contract has, as it is said, been merged in a deed giving effect to it the earlier document cannot be admitted in evidence so as to affect the construction of the deed: see, *e.g.*, *Burrows' Interpretation of Documents*, p. 16. In a footnote on the same page reference is made to *Palmer* v. *Johnson* (1884), 13 Q. B. D. at p. 356 as authority for the proposition that the rule in question does not apply to parts of the preliminary contract which are not to be embodied in the deed and are not to be found there. In that case it was said by Bowen, L.J., that "when one is dealing with a deed by which the property has been conveyed, one must see if it covers the whole ground of the preliminary contract. One must construe the preliminary contract by itself, and see whether it was intended to go on to any and what extent after the formal deed had been executed". If *Butler* v. *Mountview Estates, Ltd.*, had been decided solely by the application of that test no doubt the vendor would have been unable to gain any benefit from the contract. The vendor's advisers may or may not have thought that it was hopeless to attempt to contradict the conveyance by reference to the contract, and thus to obtain rectification of a completed

assignment, particularly after the purchaser had since effected a sale of the leasehold premises in question.

The principle of merger of a contract in a deed giving effect to it, and the rejection of evidence which tends to affect the construction of that deed may seem to be an obstacle to rectification; but the principle under which rectification may be claimed is quite a different one, the underlying notion being that the parties have made a mutual mistake resulting in the completion of the document in question in a form quite different from that which both parties intended.

Danckwerts, J., delivering judgment in the *Butler Case*, held that the fact that the purchaser knew that there had been breaches of the repairing covenant was no answer to the purchaser's claim under the implied covenants for title, citing *Page* v. *Midland Ry.*, [1894] 1 Ch. 11, and also rejected the vendor's plea that the purchaser had no right of action against the vendor until the lessor had made a claim against the assignee. He upheld, however, the vendor's counsel's contention that any right of re-entry which the lessor might have had at the date of the assignment had been lost by the subsequent acceptance of rent. Nevertheless, by virtue of the implied covenant (*inter alia*) that the repairing covenants had been performed, the purchaser had, under the assignment as it stood, a right to claim damages against the vendor.

Rectification

In *Lockharts* v. *Rosen* (*Bernard*) *& Co.*, [1922] 1 Ch. 433, a rather similar situation arose *before* completion of the assignment of leasehold premises where the sale was subject to the premises being taken "in their present condition". The lessor between contract and completion served a schedule of dilapidations with which the purchasers refused to comply. The vendors executed the necessary work. The Court held that the purchasers were liable to indemnify the vendors, and that the vendors were entitled to an order for specific performance on that footing.

In *Butler's Case*, Danckwerts, J., did not consider that the completion of the assignment or the failure of the vendor to claim rectification in the pleadings debarred him from dealing with the situation by rectifying the assignment so as to make it accord with the contract, and thus to defeat the purchaser's claim. The form of the order made by the learned Judge is dealt with later; but meanwhile it is proposed to consider the position in a case where there is no provision in the contract under which the purchaser is required to take the property in its present condition.

EXISTING.

Position Under an Open Contract

It might be supposed that it followed from the implied covenant by a vendor of leasehold premises as above mentioned, that a purchaser of leasehold premises under an open contract would be entitled to damages upon showing that the premises were not in such a state of repair as was required according to the terms of the implied covenant, and that the implied covenant of the purchaser did not extend to any works which were due to be performed by the vendor as lessee for the time being up to the date of the assignment. That may be the true position; but it is not clear that such a conclusion was justifiable before the decision in *Butler* v. *Mountview Estates, Ltd., supra.* The liability of a purchaser under an open contract to covenant to pay the rent and perform the lessee's covenants and to indemnify the vendor in that respect is considered by *Williams on Vendor and Purchaser* (4th ed.) at pp. 681 *et seq.*

It may be useful to dispose of an incidental point before proceeding to the general question of the effect of the usual form of covenant entered into expressly or impliedly by a purchaser of leasehold premises. It appears that in the absence of an express covenant or a covenant implied by statute (L. P. A., 1925, s. 77 (1) as read with Sched. II, Part X), the liability of an assignee of leasehold premises to indemnify the original lessee extends only to omissions to pay the rent or keep the covenants during his own tenancy, and not to any such omission after he has assigned the lease: see *Williams on Vendor and Purchaser* (4th ed.), at p. 682, note (*r*), citing *Sugden on Vendor and Purchaser*, 38. It is, however, pointed out in that note that the ordinary covenant (*i.e.*, the statutory covenant last mentioned) will be implied (*i.e.*, on assignment by a vendor of leasehold premises "as beneficial owner") unless it is expressly excluded, and that it is believed that it is not the practice to exclude it. We may now summarise the conclusions arrived at in the same work concerning the form of covenant to which a vendor is entitled under an open contract to exact from a purchaser of the entirety of leasehold premises, and the effect of such a covenant:—

(1) If the vendor will remain under liability in respect of the rent and covenants, the purchaser must covenant thenceforth to pay the rent and perform the lessee's covenants and to indemnify the vendor against all liability by reason of any future omission to pay the rent or perform the lessee's covenants. That indemnity must accordingly be given where the vendor is (a) the original lessee or an assignee who has given a similar covenant when taking

an assignment or (b) the personal representative of such lessee or assignee (at p. 681).

(2) Then follows a statement (which refers generally to all cases where the vendor will remain liable for breaches of covenant or contract after parting with the freehold or leasehold property in question) that the sole object of the covenant to be entered into with the vendor is to secure his indemnity against any future breach of the conditions on which the land sold is held; and (except on the purchase of leaseholds) the purchaser is entitled to require that his covenant shall be expressed so as not to impose on him any greater liability than this (at p. 681).

(3) In the case of an assignment of leaseholds the vendor is entitled in accordance with long established conveyancing practice to a covenant in the form above mentioned, which in terms requires the purchaser to pay the rent and perform the lessee's covenants *and* to indemnify the vendor. Such a covenant does not, however, give the vendor a right to insist on the performance by the purchaser of the covenants except in so far as such performance is necessary for the purposes of his own indemnity (at p. 681 : and see note (*p*), *ibid.*). As I understand that statement it does not mean that the purchaser must indemnify the vendor in respect of *past* breaches of covenant: see (4) below.

(4) " Where on a sale of leaseholds the vendor is bound to pay the rent and perform the covenants in the lease up to the proper time for completion, as is the case under an open contract, it is thought that a purchaser cannot be required to enter into such a covenant as would extend to indemnify the vendor against past breaches of covenant, and it is submitted that in such case the purchaser cannot safely enter into a covenant of indemnity in the common form *which has been hitherto usual*; for this, it seems, might be held to oblige him to indemnify the vendor against past breaches of covenant : but he should insist on his liability being expressly limited to indemnity against future omission to pay the rent and keep the covenants " (*ibid.*, p. 682).

As to the words which I have italicised above, *Williams* refers to precedents, and points out that there is the same objection to the implied statutory covenant. It may be added that despite the warning in the various editions of *Williams on Vendor and Purchaser* during at least the past forty-seven years against the entry by a purchaser into an unqualified covenant in the common or statutory form, the practice does not appear to have changed, whether the purchaser was or was not required, under the provisions of the contract, to take the property in its present condition.

In relation to open contracts for the sale of leaseholds, *Williams* suggests that the statutory form of covenant by the purchaser (which is equivalent to the common form) " should be modified by adding such words as " save so far as any proceedings or claims shall relate to non-payment of rent or breaches of covenant prior to the date hereof ". It may perhaps be respectfully suggested that it will often be necessary to substitute the actual date fixed for completion for " the date hereof ", *e.g.*, where there is delay in completing the purchase. It is seldom that the exact date of actual completion can be forecast with certainty when the assignment is being drawn, and the assignment normally bears the date of actual completion, whereas the purchaser is normally liable to pay the rent and perform the lessee's covenants as from the date fixed for completion.

(5) It is clear that *Williams* appreciated the incongruity of the view that a purchaser's common form covenant for indemnity could extend to past breaches of covenant in a case where the vendor gave the usual covenants for title (*ibid.*, p. 683, note (*a*)); but he took the view that the breach of a repairing covenant might be regarded as a continuing breach, that being the ground upon which in his opinion the decision in *Gooch* v. *Clutterbuck*, [1899] 2 Q. B. 148 might be supported. That decision was not cited in *Butler* v. *Mountview Estates, Ltd., supra.* An expression of opinion by the learned Judge concerning some of the dicta in that case would have been of interest, particularly in view of his remarks concerning the necessity for qualifying the *vendor's* implied covenant. In *Gooch* v. *Clutterbuck*, *supra*, a leasehold interest having become vested in the executors of a deceased assignee, they sold that interest to X. The premises were then in a dilapidated condition. X covenanted in the assignment *thenceforth* to pay the rent and perform the lessee's covenants and to keep the executors and the estate of their deceased from *such payment and performance.* The lessor having claimed damages against the executors, the executors brought in X as a third party. Judgment was given for damages against the executors, they to recover from X such damages and all costs incurred by them. It appeared that the executors had assigned " as trustees ", so that no implied covenant for title was given, as would have been the case upon an assignment for valuable consideration by a person assigning " as beneficial owner ". A. L. Smith, L.J., considered that as X knew that the premises were out of repair the true construction of the covenant was that X was to indemnify the executors against their then liability as well as afterwards.

Rigby, L.J., assumed that X gave less for the property because of its condition. That was a very reasonable assumption; but it is not clear that such a circumstance would affect the construction of the covenant entered into by X.

Vaughan Williams, L.J., referred to the fact that the indemnity was expressed to be an indemnity against "performance" of the covenants, and not against "actions for non-performance". He also pointed out that after assignment, the executors would have no right to enter to perform the covenant to repair. With respect, it may be submitted that in the case of a similar covenant, as read with an implied covenant by a vendor (assigning as beneficial owner), it would clearly be no answer for the vendor to say "It is true that my implied covenants include a covenant that I have performed my repairing obligations to date; but I have now no right to enter to effect repairs. Therefore your covenant *henceforth* to perform the covenants and to indemnify me must be read as requiring *you* to make good at your own expense any breaches of the repairing covenant". The question which the last mentioned observation of Vaughan Williams, L.J., raises is whether the same covenant by an assignee is to be construed differently according to whether the assignor has or has not a right of entry to remedy breaches of a repairing covenant. It is submitted that the answer is in the negative. On the other hand it may well be that the explanation of the decision in *Gooch* v. *Clutterbuck*, now under consideration, is that where there is simply a covenant in certain terms by an assignee and no covenant by the assignor such a covenant may have an effect quite different from that of a similar covenant by an assignee as read with a covenant by the assignor dealing to some extent with the same subject-matter. All three Judges agreed that X was liable and an order was made as above mentioned.

It is quite likely that the failure of practitioners to make any change in the wording of assignments by executors or trustees in consequence of the decision last discussed is due to the fact that the executors emerged on the winning side. In *Williams on Vendor and Purchaser* (4th ed.), at p. 682, it is suggested that *Gooch* v. *Clutterbuck* may be supported on the ground that the breach of the covenant to repair was a continuing breach (*a*), and the assignee covenanting to perform the covenants as from the date of the assignment came under an immediate duty to perform the covenant to repair, and he could not perform that duty without

(*a*) There is, of course, no doubt that a breach of covenant to repair is a continuing breach, *Penton* v. *Barnett*, [1898] 1 Q. B. 276.

remedying the whole breach of the covenant [*i.e.*, by effecting the repairs neglected by the assignors and their testator]. *Williams* does not, however, bring out the point that in *Gooch* v. *Clutterbuck* there was no implied covenant by the vendor executors that the covenants had been performed. He states (at p. 682) that a purchaser under an open contract cannot safely enter into the common form covenant because it might oblige him to indemnify the vendor against past breaches of covenant. But apart from *Gooch* v. *Clutterbuck*, where there was no implied covenant by the vendors, it is not clear how a vendor assigning as beneficial owner could throw upon a purchaser under an open contract the liability for past breaches. By his own implied covenant he would be bound to show that there was no outstanding breach, or pay damages, and it seems from *Butler* v. *Mountview Estates, Ltd.*, that the common form covenant would oblige him merely to perform the covenants thenceforth.

In any event from a practical viewpoint the boot is really on the other foot. There must be very few cases indeed where a vendor who sells a dilapidated leasehold property expects to be required to pay damages for the failure to hand it over in good condition. That fact is so notorious that the requirement that the purchaser should take the property as it stands has been incorporated in the standard forms of contract and conditions of sale. The curious point is that such contracts and conditions have contained no provision for the qualification of the covenants by a vendor implied upon an assignment by him as beneficial owner, or for an extension of the implied covenants of the purchaser.

Qualification of Vendor's and Assignee's Covenants

In the course of his judgment in *Butler* v. *Mountview Estates, Ltd.*, *supra*, Danckwerts, J., referred to Form 10, on p. 593 of Vol. I of *Key and Elphinstone's Precedents in Conveyancing*, which is a proviso restricting the liability of the vendor under his implied covenants on a sale of leaseholds when the covenants of the lessee have been broken and negatives any implication that the painting or repairing covenants have been performed. In order to avoid all doubt it is submitted that the better course is not merely to modify the vendor's covenant but also to extend the assignee's covenant. Possibly opinions may differ concerning the question whether that qualification and extension should apply to all the lessee's covenants except for payment of rent, and not merely to painting and repairing covenants.

A form which may be appropriate will be found at p. 526, *infra*.

The Order in Butler's Case

In *Butler's Case* the learned Judge directed that the assignment be rectified by the addition of a proviso on the lines of the form in *Key and Elphinstone* above mentioned with such modifications as might be required by the circumstances, subject to a further proviso as mentioned below. It appeared that the plaintiff had sold the three leasehold properties, and his Lordship stated that if the person who had purchased from him was a purchaser for value without notice of the claim to rectify, the rectification should be so limited as not to affect the purchaser. He therefore directed that a copy of the Order should be indorsed on the assignment directing rectification with the words : " Provided always [? that] these alterations do not affect any purchasers for value without notice of the right to claim rectification ". It remains to be seen whether this decision will cause solicitors acting for vendors to insist upon the qualification of the implied statutory covenants upon an assignment for valuable consideration of leasehold property. It is hardly to be doubted that solicitors acting for both vendors and purchasers of a dilapidated leasehold property " in its present condition " tend to assume that no harm can be done by allowing their clients to enter into and to accept the implied covenants which Parliament has provided in that behalf where no special provision is made in the contract and the common form of assurance is followed. Apart from the question here considered is it altogether clear that a vendor who has a rather doubtful title and has provided in the contract that no requisition or objection shall be taken or made in respect of certain defects is safe in giving to the purchaser full covenants for quiet enjoyment, freedom from incumbrances, further assurance and good right to convey? A lay vendor normally imagines that when his title has been examined and its weaknesses (if any) laid bare and the purchase has been completed, he will not be required to account for any trouble which the purchaser may have, apart from anything which he has himself wrongfully done or concealed. The case of *G.W. Ry.* v. *Fisher*, [1905] 1 Ch. 316, is a reminder that it is useless merely to give notice in the contract or even on the face of the conveyance that the property is subject to a liability or (say) a right of way. It was held in the case last mentioned that if the property is conveyed by the vendor as beneficial owner and is not conveyed subject to the right of way the purchaser is entitled to proceed against the vendor under the statutory covenant, and unless the vendor is able to obtain rectification he must suffer the consequences of his failure to modify that covenant or to convey subject to the right of way.

These remarks are made with full knowledge of the fact that it is generally difficult to persuade a purchaser's solicitor to accept a condition in the contract under which the implied covenants of the vendor are to be qualified; but where a particular defect is revealed and requisitions and objections are excluded, it should not be impossible to persuade the purchaser's solicitor to accept a provision that the conveyance [assignment] shall be so framed as to exclude any liability of the vendor under the covenants implied by his conveying [assigning] as beneficial owner in respect of any actions, proceedings, costs, damages, claims or demands arising out of or in consequence of that defect.

THE SCHOOL SITES ACTS

Largely as a result of the alterations in the educational system of the country brought about by the Education Act, 1944, it is becoming increasingly necessary to consider the effects of conveyances made under the School Sites Acts and the present position of lands which have been so conveyed.

Section 2, School Sites Act, 1841, enables both absolute and limited owners to grant land not exceeding one acre in extent as a site for a school for the education of poor persons or for the residence of the schoolmaster or schoolmistress or otherwise for the education of such persons in religious or useful knowledge. By the third proviso to that section it is enacted that upon the land ceasing to be used for the purposes of the Act :—

> " the same shall thereupon immediately revert to and become a portion of the said estate held in fee simple or otherwise . . . as fully to all intents and purposes as if the Act had not been passed anything to the contrary notwithstanding ".

Section 7 of the same Act, after providing that all grants of land for the purposes of the education of poor persons whether under the authority of the Act or any other authority of law may be made to any corporation, sole or aggregate, or to several corporations sole or to any trustees whatsoever, further provides that such a grant can be made to the minister and churchwardens or chapelwardens of a parish and their successors and in such case the land shall be vested for ever afterwards in the minister and wardens for the time being.

Section 7 (1), Law of Property Act, 1925, provides that a fee simple which by reason of the School Sites Acts is liable to be divested is :—

> " for the purposes of this Act a fee simple absolute and remains liable to be divested as if this Act had not been passed ".

Most of the difficulties occasioned by the Acts arise from the reverter provided for by the third proviso to section 2. The wording is peculiar since there is to be a reverter to " the said estate " although no estate has previously been mentioned. It may be that the word " estate " is used in its loose and popular sense and not in its legal sense, and it was on this basis that it was argued in *Re Cawston's Conveyance*, [1940] 1 Ch. 27, that the Act did not there apply since the land in question was a plot

by itself and never part of any estate. This argument was rejected by Greene, M.R. (at p. 38), and it was held that it was not necessary for the grantor to retain other land out of which the site was granted. If it were otherwise, as Lord Greene indicated, he who owned an acre and granted it for a site would have no reverter whilst he who had an acre and a quarter and granted an acre would have one. Whilst the language is obscure it seems certain that, if the land does revert, it will revert to him who would have been entitled to the land had no grant under the Act ever been made.

In *Dennis* v. *Malcolm*, [1934] 1 Ch. 245, it was suggested that where the grantor was absolutely entitled in fee simple at the time of the grant so that he could well have granted the land without the aid of the Act then the reverter would not take effect. Clauson, J., held (at p. 250) that if it was plain that the deed was intended to operate and to operate only under the Act the reverter did take effect, but that if the deed used some expressions showing that it was intended to operate either under the Act or independently of the Act the result might be different. It will be rare in practice to find such a case : usually advantage is taken of section 7, and the grant is made to the vicar and wardens and their successors; since this is impossible except under the Act a conveyance to such grantees will indicate an intention that the deed is to take effect under the Act and is incapable of taking effect otherwise. (See remarks of Lord Greene, M.R., in *Re Cawston's Conveyance* (*supra*, at p. 36).)

In *Re Cawston's Conveyance* (*supra*) it was argued that if the original grant was for full consideration the reverter should not take effect but the Court of Appeal, upholding the judgment of Simonds, J., [1939] 1 Ch. 784, held that since the Act contemplated the receipt of money for the grant the reverter took effect. Thus it is safe to say that, on the land ceasing to be used for the purpose of the Acts, the reverter will take effect in all cases where the grant was made under the Act, whether for full consideration or not.

The next matter is to decide when the land has ceased to be used for the purposes of the Act. In *Att.-Gen.* v. *Shadwell*, [1910] 1 Ch. 92, there was a grant under the Acts and the trusts declared of the premises were in a form very common to such grants : the land was to be used as a school for the education of children and adults, or children only, of the labouring classes and for no other purposes, and should be conducted according to the principles of the National Society for Promoting the Education of the Poor in the principles of the established church and the

officiating minister for the time being was to have the superintendence of the religious instruction and might direct the premises to be used for the purposes of a Sunday school. Until 1907 the premises were used as a public elementary school, in that year they ceased to be so used but were in continuous use as a Sunday school until the date of the action.

Warrington, J., said (at p. 98) :—

> " The Act specifies three purposes for which land may be granted—first, a school for the education of poor persons : secondly, for the residence of the schoolmaster or schoolmistress : and thirdly, otherwise for the purposes of the education of such poor persons in religious or useful knowledge. The grantor may select his own purpose from amongst those three, and the operation of the Act is to give force and effect to his grant, even if he be only a limited owner. Can it be the true construction of the Act that though the land ceases to be used for the purposes expressed in the grant, yet, nevertheless, if it is used for one or more of the other purposes in the Act mentioned, the reverter will not take place? . . . I think you must read ' the purposes in this Act mentioned ' as meaning . . . the purposes to which the land was devoted by the grantor ".

The learned Judge then found that the primary purpose of the grant was the provision of a day school and that the holding of a Sunday school :—

> " was merely permissive and ancillary to the purpose for which the grant was made "

and therefore held that the land had reverted in 1907 when the day school had ceased to be carried on. It will be found in practice that the majority of grants were made in terms very similar to those in *Att.-Gen.* v. *Shadwell* (*supra*), and that case is authority for the fact that the reverter takes place when the premises cease to be used as a day school and is not prevented from taking place by the fact that the premises continue to be used as a Sunday school or for other parochial purposes.

As a result it very often occurs that the land reverts without the grantor or his successors in title being aware of the fact and the minister and wardens continue in possession of the premises. The question then arises whether or not after a lapse of twelve years the title of the grantor or his successor is liable to be extinguished by the Limitation Act, 1939. It will be observed that by section 7 (1), Law of Property Act, 1925, the estate of the trustees remains a legal fee simple liable to divesting as though the Act had not been passed. This seems to be an

unnecessary provision so far as the School Sites Acts are concerned. By section 29, Settled Land Act, 1925, the land, being vested in trustees for public purposes, is settled land in any case and had section 7 (1), Law of Property Act, 1925, not applied the trustees would have held upon the trusts declared in the grant until the reverter took place, and for the grantor or his successors in title after the reverter took place. Thus there would have been a shifting of an equitable interest only and the title of the grantor or his successor would not, by the Limitation Act, 1939, s. 19 (1) (*b*), have been extinguished by lapse of time. The provisions of section 7 (1), Law of Property Act, 1925, however, result in some obscurity without any compensating advantages.

It is provided by the Law of Property Act, 1925, s. 3 (3), that :—

> "Where, by reason of a statutory or other right of reverter . . . a person becomes entitled to require a legal estate to be vested in him . . . the estate owner whose estate is affected shall be bound to convey or create such legal estate as the case may require"

so that, if this section applies, it is necessary for the trustees to convey the land to the grantor or his successor in title; the trustees, therefore, once the reverter occurs, hold the land as bare trustees and if this is so the Limitation Act, 1939, s. 19 (1) (*b*) would apply, and the title of the grantor or his successor would not be extinguished by lapse of time.

The wording of the Law of Property Act, 1925, s. 7 (1), is such as to cast doubt upon whether or not section 3 (3) can apply. It is there provided in clear terms that the estate of the trustees is a fee simple for the purposes of the Act only and that it is liable to be divested as if the Law of Property Act had never been passed. If this means what it says then section 3 (3) can have no application since it is part of the Law of Property Act, 1925, and in ascertaining in what manner the reverter takes effect we are directed to ignore the provisions of that Act. Under the old law no conveyance was necessary to give effect to the reverter and hence the legal estate shifted forthwith to the grantor or his successor. If, as section 7 (1) on the face of it provides, it is in this manner that the reverter takes effect, then, if the trustees are allowed to remain in possession without acknowledgment for twelve years the title of the grantor or his successor will be extinguished.

It is a matter for regret if this is the true construction of the statute since one of the objects of the 1925 legislation was to abolish shifting legal estates, and it may be argued that section

3 (3) and the latter words of section 7 (1) are inconsistent, and that no useful purpose can be given to section 3 (3) so far as this type of reverter is concerned unless section 7 (1) is read in the sense that the estate of the trustees remains liable to be divested on the happening of the events upon which it would have been divested had the Act not been passed, but that the modern "machinery" declared by section 3 (3) to be necessary to give effect to such divesting must be used. This appears to be the more desirable construction and if it is adopted the title of the grantor or his successor, by reason of section 19 (1) (*b*), Limitation Act, 1939, will not be liable to extinguishment. As stated above, the difficulty only arises by the quite unnecessary inclusion of this class of reverter in the provisions of section 7 (1). If, however, it should be that the literal construction of section 7 (1) is preferred so that the title of the grantor or his successor is extinguished the question would arise by whom, and in what capacity would a possessory title be acquired? There is no doubt that persons who are in possession of land as trustees, and who subsequently obtain a possessory title to the land, hold the estate in the land which they so obtain upon the trusts by reason of which they were in possession. See *Churcher* v. *Martin*, 42 Ch. D. 312. In these School Sites Acts cases there is a further question to be answered.

Immediately before the land ceases to be used for the purposes of the Acts the estate in the land, subject to the reverter, is, where advantage has been taken of the second part of section 7 of the 1841 Act, in the minister and wardens as an *ad hoc* corporation created for the purpose by that section. Immediately after the cessation the fee simple is in the grantor or his successors and the minister and wardens have nothing. After the lapse of twelve years the occupiers may obtain a possessory title to the land but they do not obtain it by reason of any grant or under any provision of the School Sites Acts. Section 7 of the 1841 Act provides that a grant of land may be made for certain purposes to the minister and wardens who are an *ad hoc* corporation for that purpose, but the section says nothing of creating a corporation capable of acquiring possessory titles independently of the Act and whatever the true nature of a possessory title it cannot be said to lie in grant. It seems, therefore, that, if the reverter takes place and the minister and wardens remain in possession without any acknowledgment they will obtain a possessory title as trustees holding on the trusts declared in the original grant, but that they will obtain such a title as individuals and not in their corporate capacity which only extends so far

as is necessary to enable them to take land under the Act by grant.

By section 86 (2), Education Act, 1944, where it is desirable under a scheme made in pursuance of the Endowed Schools Acts, 1869 to 1908, to sell land forming part of an endowment but that such cannot be done by reason of the third proviso to section 2 of the 1841 Act, the minister may direct that the reverter shall not take effect but he can only do so if either :—

The person to whom the land would revert cannot be found, or

He has been found but has consented to relinquish his rights; if such relinquishment is in consideration of a money payment it is to be paid out of the proceeds of sale.

Hence the question whether or not the title of the grantor or his successor is liable to extinguishment becomes of first importance where the premises have ceased to be used as a school more than twelve years before the suggested scheme and no acknowledgment of his rights has been made. If his title has been extinguished the trustees hold the land on a possessory title and there is no reverter which might be an impediment to the scheme. It frequently occurs in practice that the premises have since the reverter been used for Sunday schools and for other parochial purposes, and frequently the parish has expended a considerable amount of money on them. In these circumstances the parochial authorities are most unwilling that the premises should be included in a ministerial scheme where it is proposed that the premises should be sold since the usual result is that the parish, if it wishes to retain the use of the buildings, has to find the money to purchase them. It is often found, however, that if the premises revert to the grantor or his successor, the person to whom they revert, particularly if he is a local landowner of substance, is willing to regrant the premises to the Diocesan Board of Finance under the Parochial Church Councils (Powers) Measure, 1921, for parochial purposes.

If the reverter took place less than twelve years earlier, or if the secondly above-mentioned construction of section 7 (1), Law of Property Act, 1925, is adopted all is well, but if more than twelve years have elapsed and the literal construction of that section is adopted an action by the grantor or his successor to enforce the reverter could be met with a defence based upon the Limitation Act, 1939. In such circumstances the trustees would doubtless be most reluctant to take such a course, but there is no doubt that, as trustees of a charity, it is their duty to do so: they cannot allow the premises to be lost to the charity because they do not like the proposed scheme.

DWELLING-HOUSES ON AGRICULTURAL HOLDINGS

By D. C. Potter, LL.B., Barrister-at-Law

One purpose of the Agricultural Holdings Act, 1948, is to give a measure of security of tenure to tenants of agricultural land. A problem which has already puzzled many practitioners and seems likely to give rise to a fair amount of litigation arises from the fact that the Act omits to state specifically how far this security is to extend to dwelling-houses which may be let in the same tenancy with agricultural land, but not in themselves primarily devoted to agriculture. The purpose of this short article is to examine the possible application of the Act to such properties.

We can best begin by examining the relevant provisions of the Act. The Act protects " agricultural holdings " which are defined by section 1 in the following terms:

" 1. (1) In this Act the expression ' agricultural holding ' means the aggregate of the agricultural land comprised in a contract of tenancy, not being a contract under which the said land is let to the tenant during his continuance in any office, appointment or employment held under the landlord.

(2) For the purposes of this and the next following section, the expression ' agricultural land ' means land used for agriculture which is so used for the purposes of a trade or business . . . ".

Pausing here, we may observe that although no mention is made of buildings, no difficulty arises in the context, as the word " land " includes buildings fixed to the land. The word " agriculture " is defined by section 94 in the following terms:

" ' Agriculture ' includes horticulture, fruit growing, seed growing, dairy farming, and livestock breeding and keeping, the use of land as grazing land, meadow land, osier land, market gardens and nursery grounds, and the use of land for woodlands where that use is ancillary to the farming of land for other agricultural purposes, and ' agricultural ' shall be construed accordingly."

Again no mention has been made of buildings, but this time the omission is unexpected. Of course, the usual type of farm building can be brought within the definition, since it is itself used for agriculture in practically the same way that a field is used. But a farmhouse or a labourer's cottage is not so intimately connected with the farming of the land as a barn or a cow shed, and can scarcely be considered as more than ancillary to the agricultural

land. The Act makes express mention of woodlands if they are ancillary to agricultural land. Since no mention is made of houses, we presume from those sections that, on the principle *expressum facit cedere tacitum*, houses are not generally to be included even if they are ancillary to agricultural land. Moreover, it may be thought that this presumption is supported by the language of section 1, which defines an agricultural holding as the " aggregate " of agricultural land comprised in a holding, thereby implying, one imagines, that there may well be holdings which contain both agricultural and non-agricultural land.

So far, however, the Courts have not adopted the view that the Act was intended to exclude houses from the definition of " agricultural holding ", and indeed from a reading of the Act as a whole it seems that this could hardly have been Parliament's intention. In particular, section 1 of the Seventh Schedule indicates that a dwelling-house may well be included in an agricultural holding. This section is in the following terms:

" The Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, shall not apply to any dwelling-house which is comprised in an agricultural holding and is occupied by the person responsible for the control (whether as tenant or as servant or agent of the tenant) of the farming of the holding."

The effect of this enactment is to remove from the Rent Acts a dwelling-house occupied by a tenant-farmer or farm-manager; one presumes from this that the Act as a whole contemplates the possibility of a dwelling-house being a part of an agricultural holding. But we are told little more and there is no definite indication of the extent to which dwelling-houses are to be protected by the Agricultural Holdings Act.

No doubt the Courts will in time supply the deficiencies of the Act, but it seems at the moment that no matter what construction one places on the relevant sections, difficulties arise as soon as one considers actual circumstances. These difficulties may be illustrated by a few examples that may well arise in practice.

To begin with, no " service occupancy " is protected by the Act. Indeed section 1 makes a wider exception that includes many tenancies which would not come under the normal interpretation of the phrase " service occupancy ". For a service occupancy only exists where the occupier is not merely permitted or required as a matter of convenience to both parties, but is obliged for the proper performance of his duties to occupy the property in question. (*Dover* v. *Prosser*, [1904] 1 K. B. 84; *Ramsbottom* v. *Snelson*, [1948] 1 K. B. 473.) But the definition in section 1 of the Act

removes from the scope of the Act a wider class than such service occupants.

Another point which seems reasonably clear is that where a dwelling-house comprised in a holding which is otherwise an agricultural holding is a "necessary part" of that holding for the purpose of the agricultural business carried on there, the dwelling-house is comprised in the agricultural holding so as to be protected with it. This proposition, it is submitted, is established by the decision of the Court of Appeal in *Dunn* v. *Fidoe*, [1950] 2 All E. R. 685. In that case there was a tenancy of an inn, outbuildings and land, totalling some twelve acres, of which less than half an acre was occupied by the inn and its garden. The inn was not a farmhouse, but parts of it had been adapted for use with the land, which was agricultural. There was evidence that the inn alone was eight times more valuable than the agricultural land, although some profits were made from the sale of the fruit produced by the land as well as the much greater profits made from the sale of liquor at the inn. The landlord gave notice to quit and the tenant served the counter-notice under the Act; in due course the landlord brought proceedings in the county court for possession, whence the matter came before the Court of Appeal. Now there was no question but that the land apart from the inn and its garden would have been an agricultural holding had it been let separately. But it was found as a fact by the county court judge that the inn in which the tenant lived, was a "necessary part" of the land in connection with the business of agriculture carried on by the tenant; accordingly, although as far as the value of the separate parts went the letting was not predominantly agricultural, the premises as a whole constituted an agricultural holding. The landlord failed to obtain an order for possession. The Court of Appeal decided that in view of the finding of the Judge in the lower Court, that the inn was a necessary part of the agricultural land, the law was clear, and the opportunity did not arise of deciding "the interesting and critical questions of law around which the argument revolved". It is submitted that this decision establishes the rule that agricultural land includes not only land devoted to the purposes set out in the definition section of the Act, but also land and buildings which, though apparently outside the definition, are a necessary part of such land, although used almost wholly for non-agricultural purposes. In applying this rule much depends on the findings of fact in individual cases and it is possible that if facts similar to those in *Dunn* v. *Fidoe* were to occur again, the Court would be loath to find that an inn, eight times more valuable

than the land let with it, was a necessary part of that land. No doubt future decisions will explain the meaning of the word "necessary", among other things.

We must now examine the position where there is a "mixed tenancy", that is to say, where a dwelling-house let with agricultural land is not a necessary part of that land. Here the law is not wholly certain and two distinct views have been suggested by the Court of Appeal. The first was put forward *obiter* by Tucker, L.J., in *Dunn* v. *Fidoe*. According to this view the land must be regarded as severed, so that the purely agricultural part is protected by the Act, while the non-agricultural part is not. A notice to quit would thus be effective for only part of a tenancy. The other view is that adopted by the Court of Appeal in *Howkins* v. *Jardine*, [1951] 1 All E. R. 320, and according to this a mixed tenancy is outside the protection of the Act, so that no question of severance arises, and the tenancy must consist solely of agricultural land, if the Act is to apply. These two views are quite irreconcilable, and in the absence of further authority, we are bound to prefer the second, as it formed the *ratio decidendi* of two of the judgments, while the third Lord Justice of Appeal, Jenkins, L.J., approved it, while preferring to decide that on the facts of the case he was prepared to reach the same conclusion whichever view was taken.

This is a convenient point at which to observe that towards the end of his judgment Jenkins, L.J., decided that the tenancy he was considering was not a mixed tenancy at all, but the whole of the property let, consisting of seven acres and three cottages, was an agricultural holding within the meaning of the Act. The learned Lord Justice had earlier remarked that the cottages were "ancillary" to the land, but he did not say that they were necessary. It may be, therefore, that agricultural land includes, besides purely agricultural land, other land which is either necessary or ancillary to it.

The rule, however, upon which Somervell, L.J., and Hodson, J., appear to have based their judgments in *Howkins* v. *Jardine* is that where a tenancy is mixed, being part agricultural and part non-agricultural land, and the non-agricultural part is substantial, then the Act does not apply to any part of the tenancy. This may be illustrated by the facts of a decision upon earlier legislation, *Re Lancaster and Macnamara*, [1918] 2 K. B. 472, in which it was found that the tenancy was mixed. The tenant held a farm and an inn under one tenancy created by parol, and there was no evidence that the inn was used for the purposes of the farm. The Court of Appeal held that the tenancy was not an agricultural

holding, and Scrutton, L.J., made the following observation, which has been approved by the Court in *Howkins* v. *Jardine* as applicable to the present Act:

"I imagine that in dealing with the question of fact as to whether a holding was wholly devoted to agriculture and/or pasture you would disregard infinitesimal things . . . . But if you find any substantial part of the land used for a purpose which is neither agricultural nor pastural, Parliament, for some reason into which I have not troubled to enquire, has not thought right, in my view, to give compensation either in respect of the whole land or in respect of that part of it which is wholly devoted to agriculture".

But even if we reject the whole idea of severance, as we must unless the House of Lords give it their approval later, it is still not entirely clear what the rule is as to mixed holdings; but no doubt further litigation will clarify the situation. On the face of it there are two rules which seem to fit nicely together:

(1) Agricultural land includes land which, though not used for agricultural purposes itself, is either necessary or ancillary to agricultural land comprised in the same holding.

(2) A holding to which the Act applies is one where substantially the whole of the land comprised in that holding is agricultural land. The Act does not apply to mixed tenancies.

It is submitted that these rules are deducible from the three decisions cited above in this article. At first sight these rules seem to work out nicely. To find out whether a holding is protected by the Act or not, you simply lump together all the purely agricultural land in the holding, add thereto any other land which is necessary or ancillary to that agricultural land for the purpose of the trade or business carried on, and then if there is still a substantial piece of land outstanding, the holding is not within the Act. It is submitted that this test is in effect the same as that propounded by Somervell, L.J., in *Howkins* v. *Jardine* when his lordship said that "for the Act to apply the tenancy as a whole must be in substance a tenancy of agricultural land".

It is to be noticed that the rule set out above does not mean that you look for the main or dominant user of the whole holding. The dominant user may well be non-agricultural while the holding is still within the Act. This was in fact what happened in *Dunn* v. *Fidoe*, where the non-agricultural inn was clearly the tenant's main source of income, and agriculture was little more than a side-line. But since the inn was in fact used for the purposes of the side-line, it was ancillary or necessary to it, so that the whole holding was agricultural. Had the inn been

kept quite separate from the farm, the tenancy as a whole would have fallen outside the Act, no matter what the relative importance of the two parts.

Another small point which calls for attention arises from the rule suggested by Scrutton, L.J., in *Re Lancaster and Macnamara*, which says that if you find any substantial part of the holding used for a purpose which is not agricultural, then the whole holding is outside the Act. The non-agricultural part of the holding in that case was in fact never used for agriculture to any extent whatever, and it is submitted that the rule was intended to mean that a holding was outside the Act only where a substantial part is used *exclusively* for a non-agricultural purpose. Otherwise that rule is inconsistent with the decision in *Dunn* v. *Fidoe*, where although the whole of the holding was protected, it was still true that a part of the holding, the inn, was used (though not exclusively used) for a purpose which was non-agricultural. If this is borne in mind, there exists, it is submitted, a test by which it is possible to ascertain whether the Act applies to a mixed tenancy.

Special mention must be made of the relationship of the Agricultural Holdings Act to the Rent Acts. Although both sets of legislation give a measure of security to a tenant, it scarcely seems possible that the same tenancy can enjoy the two different types of protection. It seems that either one or the other applies, but not both. The area of possible overlap is rather small, because for one thing it is not very common to find a small holding containing a dwelling-house, where there is a trade or business of agriculture carried on to which the house is necessary or ancillary; and on the other hand the Rent Acts do not apply to dwelling-houses let with a large amount of agricultural land (in the case of "new control" a house cannot be protected if the land and house together total above two acres—*Rent and Mortgage Interest Restrictions Act*, 1939, s. 3 (3)). Now as we have seen above, the Agricultural Holdings Act makes no mention of the Rent Acts except in the Seventh Schedule, where it is enacted that the Rent Acts shall not apply to any dwelling-house comprised in an agricultural holding and occupied by the person responsible for the control of the farming of the holding. We may presume from this that the Act does not repeal the Rent Acts except within the limits of this exception. It is therefore submitted that where any holding would, apart from the Agricultural Holdings Act, be controlled by the Rent Acts, the Rent Acts shall continue to apply to that holding, and that the Agricultural Holdings Act only applies to such properties in the special cases set out in the Seventh Schedule. This submission proceeds on the assumption,

which cannot be discussed in this short article, that one property cannot be subject to both forms of control. It is worth noting, however, that it has already been held that Parsonage houses, being already subject to control under the Pluralities Act, 1838, are excluded by implication from the Rent Acts. (*Bishop of Gloucester* v. *Cunnington*, [1943] K. B. 101.)

It is a pity the Act does not make special mention of agricultural cottages. One thing that is clear is that if cottages are let together with agricultural land, it will readily be found that the cottages are necessary or ancillary to the land and so deemed to be agricultural land themselves. This is demonstrated from the facts in *Howkins* v. *Jardine*, where three cottages let with only seven acres of farm land were held to be an agricultural holding. It also seems that the agricultural character is not lost if the cottages are not occupied exclusively by agricultural workers, provided either that the cottages are agricultural cottages by nature (*per* Hodson, J.), or the terms of the letting were appropriate to an agricultural letting (*per* Jenkins, L.J.). Of course, if the cottages are not agricultural cottages at all, then the whole tenancy is outside the Act. It is not clear whether a letting of one cottage without any purely agricultural land is protected by the Act, but in view of the application of the Rent Acts to many of such cottages, the question will not often arise. The better view seems to be that a cottage can only be an agricultural holding when there is undeniably agricultural land comprised in the same letting to which the cottage is a necessary or ancillary part. The situation may well arise where a farmer who rents a holding which includes a cottage will himself be protected by the Act while his sub-tenant in the cottage will have no protection against him.

Lastly we must consider whether the Act applies to the tenant who turns over to agriculture land which at the time of letting was not agricultural land, and the contrary case, where the tenant ceases to carry on the agricultural business which he had carried on when he first took the holding. There is little authority on these two points.

In *Howkins* v. *Jardine*, where three cottages were let with seven acres of agricultural land, all three members of the Court of Appeal held that it would not detract from the agricultural character of the holding if any of the cottages were from time to time sub-let to non-agricultural tenants. But it was emphasised that this decision depended on the nature of the cottages themselves, which were clearly intended for farm workers. Somervell, L.J., made it clear, however, that he was not laying

down a general rule. It is submitted that where an alleged agricultural holding is before the Court, the test is whether the land is used as agricultural land at that time, or perhaps during the immediately preceding period. Section 1 of the Act defines an agricultural holding as "land used for agriculture" and not as "land let for the purposes of agriculture". Sections 23 and 24, which deal with notices to quit, refer to "agricultural holdings", referring, it seems, to land used for agriculture at the time the notice is served. It is a little odd that section 2, which is headed "Restriction on letting agricultural land for less than from year to year", converts into a yearly tenancy any tenancy of land for a less interest, only where that land is "let to a person for use as agricultural land". It seems on the face of it that a tenancy may well come under sections 23 and 24, without having been converted to a yearly tenancy. This is the probable solution, for sections 23 and 24 are intended to apply to any tenancy determinable by notice, and not merely to yearly tenancies. (See *Edell* v. *Dulieu*, [1924] A. C. 38.) It seems, therefore, that where a tenant turns over to agriculture land let for a quite different purpose, he gains the protection of the Act as regards notices to quit, although his tenancy may remain a weekly tenancy. On the other hand it is arguable that section 23, referring as it does to "the current year of the tenancy", is to be restricted in its application to those tenancies where there is a "current year". If the Courts adopt this interpretation, the result will at least commend itself by its fairness.

It is impossible to imagine every variety of circumstance that will arise in practice, or to give a reliable opinion on circumstances which have not yet been considered by the Courts. This short article can only touch the fringes of the problems of construction which Jenkins, L.J., confessed in *Howkins* v. *Jardine* he found it "impossible to resolve with any confidence".

D. C. P.

THE NATURE AND OPERATION OF BUILDING SOCIETY FINES

By William Geddes, M.A., LL.M., Barrister-at-Law

The purpose of this article is to examine the nature and operation of fines imposed by building societies, in the light not only of the authorities dealing specifically with such fines, but also of the authorities dealing with penalties and also of those dealing with moneylending transactions, in order to consider whether the law relating to such fines is in a satisfactory condition.

The tender and wholesome solicitude of Equity for mortgagors is a familiar topic. Although the date fixed by the contract for repayment had gone by, Equity would still allow the mortgagor to redeem on equitable terms. In course of time various detailed principles emerged, designed to prevent the clogging of the equitable right of redemption: thus the mortgage could not be made irredeemable, and, even short of that, certain conditions in a mortgage deed would be unenforceable, such as a condition that the mortgagor should lose his right to redeem on the happening of a particular event; and conditions tending to interfere with the possibility of a complete redemption have always been jealously scanned, whether they postponed the right to redeem, or gave collateral advantages to the mortgagee. We are not directly concerned with these broad and well-known topics. But, coming nearer to the subject in hand, a covenant is invalid if, without statutory authority, it imposes a penalty upon the mortgagor in the event of his not making payment on the date stipulated. Similarly a provision that the mortgagor shall pay more than the balance owing (*e.g.*, shall pay interest on principal already repaid), is unenforceable: *Booth* v. *Salvation Army Building Association* (1897), 14 T. L. R. 3. The doctrine is that the price of redemption is principal, interest upon unpaid principal, and costs, and no more. But that leaves open the questions, what principal may be recovered and what interest may be secured.

In relation to the question of principal, although the securing of an additional sum for non-payment on the due date is the imposition of a penalty and so invalid, yet it does not follow from this that a mortgagee can never recover as his principal a sum greater than that which he has advanced; the nature of the

addition is the criterion. A bonus or commission may quite lawfully be stipulated for, provided the bargain is made while the parties are on equal terms and no improper influence or pressure is used, and provided it is clear that the additional sum is not merely a penalty but is agreed to for some good reason. Thus, in *Potter* v. *Edwards* (1857), 26 L. J. Ch. 468, a lender advanced £700 and took a mortgage for £1,000. This was held valid, the extra £300 being regarded as a bonus for taking the risk of a poor security, such bonus having been expressly stipulated for and agreed to. A similar case was *Mainland* v. *Upjohn* (1889), 41 Ch. D. 126, where, on an advance of £3,600, a commission of £180 was initially deducted. The analogy with the issue of debentures at a discount will be apparent. But if there is no valid reason for the extra sum and it is merely a collateral advantage savouring of a clog on the equity or if it is a penalty purely and simply, such extra sum cannot be recovered: *James* v. *Kerr* (1889), 40 Ch. D. 449. As was said in *Thompson* v. *Hudson* (1869), L. R. 4 H. L. 1 (at p. 15)—" Where there is a debt actually due, and in respect of that debt a security is given, be it by way of mortgage or be it by way of stipulation that in case of its not being paid at the time appointed a larger sum shall become payable and be paid, in either of those cases Equity regards the security that has been given as a mere pledge for the debt and it will not allow either a forfeiture of the property pledged or any augmentation of the debt as a penal provision, on the ground that Equity regards the contemplated forfeiture which might take place at law with regard to the estate as in the nature of a penal provision against which Equity will relieve . . . and regarding also the stipulation for the payment of a larger sum of money if the sum be not paid at the time it is due, as a penalty and a forfeiture against which Equity will relieve ".

In relation to the question of interest, two rules of law must be recalled. The first is the rule that the rate of interest cannot be increased for failure to pay on a particular date, for the additional rate is regarded as a penalty: *Holles* v. *Wyse* (1693), 2 Vern. 289; *Shode* v. *Parker* (1694), 2 Vern. 316; *Nicholls* v. *Maynard* (1727), 3 Atk. 519. The converse branch of the rule, namely, that there is nothing wrong about a bargain whereby the rate of interest shall be reduced if payment is made before a particular time, or punctually, raises a curious intellectual problem, and the comments of Judges and writers on the inter-relation of the two branches are what one might expect. In *Mosely's Reports* (at p. 248), it is said that " there is no difference in reason " between the two types of condition. In *Wallingford* v. *Mutual*

Society (1880), 5 A. C. 685, at p. 702, one of the learned law Lords refers to "an extremely fine and nice distinction". In *Fisher and Lightwood's Law of Mortgage* (7th edition, at p. 745) the words used are "a well-settled if not an intelligible rule". However, all that is asked of the reader is to bear in the mind the first half of the rule, that which regards a provision for an increased rate of interest as a penalty and unenforceable, for the fact that such a rule exists shows how Courts of Equity, in this respect at least, protect mortgagors against penalties, even penal interest.

A second rule relating to mortgage interest is that which, since the repeal in 1854 of the laws against usury (by 17 & 18 Vict. c. 90), permits compound interest. Such interest may be exacted, provided the bargain for it is clearly expressed: *Clarkson* v. *Henderson* (1880), 14 Ch. D. 348; *Daniell* v. *Sinclair* (1881), 6 A. C. 181. But naturally, since compound interest involves interest upon interest in arrear, compound interest cannot be charged unless interest *is* in arrear, and so, for example, a mortgagee in possession, with sufficient rents in hand to keep down his interest, cannot charge compound interest: *Wrigley* v. *Gill* [1906] 1 Ch. 165, (C. A.). And the original bargain must no doubt have been made without any element of fraud or oppression. The statement of principle in the Irish case of *Chapple* v. *Mahon* (1870) Ir. R. 5 Eq. 225, should at this point be mentioned, namely—

> "Though, since the repeal of the usury laws, a lender may demand any interest he likes, yet the Court of Chancery's jurisdiction over unconscionable bargains did not rest on those laws and is unaffected by their repeal."

This short summary of the cases enables us to derive two propositions, namely:

(1) Equity will not (in the absence of some statutory provision) permit a mortgagee to enforce a provision of the mortgage deed which exacts a penalty, whether it be as to principal or as to interest.

(2) A mere provision for compound interest is not a provision for a penalty.

We must now consider how the subject of fines provided for by the rules of building societies fits into this scheme. There is no doubt that fines may be charged by such societies, for there is statutory authority for them.

The subject therefore resolves itself into three main questions, namely:—

I. *Must fines be reasonable?*

II. *If so, how does one decide on reasonableness?*

III. *If a system of fines is unreasonable, should the fines be totally irrecoverable, or should apportionment be possible, so as to allow a reasonable quantum?*

I. *Necessity of Reasonableness.*

So far as unincorporated societies are concerned, the Building Societies Act, 1836 (6 & 7 Will 4, c. 32), permits the members of such societies to be subjected by the rules to reasonable fines, penalties, and forfeitures, and we shall in a moment examine the relevant authorities on the matter. So far as incorporated societies are concerned, there is also statutory authority for the imposition of fines, for the Building Societies Act, 1874 (37 & 38 Vict. c. 42), by section 16 (13), states that the rules shall set forth the fines and forfeitures to be imposed upon members. But here there is no express limitation to reasonable fines. Must fines be reasonable in this case? There is little or no authority, but if the law is so unreasonable as to allow unreasonable fines, then there is nothing more to be said.

In *Wurtzburg's Law of Building Societies* (9th edition) it is stated (at p. 67) that "there appears to be no limit in the case of an incorporated society to the amount which may be thus charged". But it is difficult to accept this as law, and if one must accept it as law, it is difficult to do so with equanimity. One must surely assume that, on such a dangerous matter as the levying of fines, the law is reasonable and requires reasonableness. Especially is this so when it is remembered that in the ordinary form of building society mortgage the borrower covenants to abide by the rules for the time being, and that these rules may be altered without his further consent. As is said in *Halsbury's Laws of England*, Hailsham Edition (Vol. 3, p. 407, note (*t*)), "the most usual object with which fines are imposed is as a punishment for non-payment of subscriptions or other dues". In note (*e*) on the same page of *Halsbury* it is suggested that "possibly the same would be held true of incorporated societies". It is confidently submitted that incorporation should not affect the requirement of reasonableness. Why should incorporation absolve from the necessity of acting reasonably? We shall therefore assume henceforth that the fines which may be provided for by incorporated societies, no less than by unincorporated ones, must be reasonable.

II. *Character of Reasonableness.*

The usual provision in the rules of societies is that if the borrower makes default in payment of an instalment, he shall be liable to a fine at so much per cent. (frequently two and a half

per cent.) per month, based on the then present arrears. There are several reported cases dealing with fines of this type. In *Parker* v. *Butcher* (1867), 3 Eq. 762, there were the common-form rules empowering the (unincorporated) society to advance to its members the amount of their shares, repayable by monthly instalments covering principal and interest, and imposing fines for non-payment of the contributions at the rate of 1s. per £1 per month. It was held that the fines were reasonable within the meaning of section 1 of the Act of 1836 and were not within the doctrine of equitable relief against penalties, though under the particular rules they did not carry interest, and that a borrowing member could not redeem a mortgage to the society without paying the fines which he had incurred.

The importance of this case from our point of view is the following passage from the judgment of Lord Romilly, M.R. (at pp. 766–7)—"It is contended on behalf of the plaintiff that a fine of 1s. per month for non-payment of monthly advance repayments is unreasonable and that it is in the nature of a forfeiture, and, therefore, illegal. I disposed of this question at the hearing and stopped the defendant's counsel on this point. It is no doubt a high rate of interest, but it is one imposed to enforce regularity of payment; and upon reflection and reconsideration I see nothing unreasonable in it. It is a matter well understood between the contracting parties, and it is a contract which, in the absence of all fraud or undue pressure, the parties were perfectly competent to enter into. Neither do I see anything in the shape of forfeiture in the transaction". *Pilkington* v. *Baker*, [1877] W. N. 210 is a similar case.

Cotterell v. *Stratton* (1872), 8 Ch. App. 295 (C. A.), is not so directly in point, but must be mentioned in passing. There, in a redemption suit, the mortgagor objected to certain items, principally for fines and commissions which he claimed to have disallowed, but which were allowed to the mortgagees. Certain other items, however, went against the mortgagees, and the case as reported really turned on costs, on which it was held (reversing Malins, V.-C.), that there was nothing unreasonable in the attitude of the mortgagees in insisting on their contractual right to fines, and so there was nothing in their conduct to deprive them of their costs. In the Court of first instance, Malins, V.-C. (at p. 300) had said, "The first point raised by the plaintiff was that the society was not entitled to fines. They persisted in their right to fines and I decided in their favour; but surely the society might quite well be satisfied with taking interest upon the arrears of £140. Instead of that, the fines amount to £3 a month, so that he

was paying £36 a year on that account. Was that reasonable? I call it overbearing". The view of the Court of Appeal was expressed (at p. 305) by one of the Lords Justices as follows:—"With unfeigned respect for his Honour, I am at a loss to see how a Court of Equity can be justified in imposing upon any mortgagees the penalty of a forfeiture of their costs, or in designating their conduct as 'oppressive', merely because they have insisted upon the performance of the contract between themselves and their mortgagor, and have declined to waive any portion of the rights to which they have been adjudged to have been entitled". He then added that "the very fact that the defendants are trustees, and that the directors of the society are mere managers and agents for the members generally, would be a reason, if reason were necessary, why the contract should in this case be strictly acted upon rather than that any censure should be passed upon these directors for declining to waive it". No one will quarrel with the reasoning here, that, granted the fines were enforceable, the directors had to enforce them, and might have been liable to their members if they had failed to do so—a point of law which came up in *Re Ilfracombe Building Society*, [1901] 1 Ch. 102; (the rules of many modern societies, however, give a discretion to forgive, remit, release, or suspend fines). But with equally unfeigned respect for the Court of Appeal, the whole burden of this article is to examine the fundamental question of the nature and reasonableness of fines themselves, and the indignation of Malins, V.-C., will be observed in passing.

The next case, *Re Middlesbrough Building Society* (1884), 51 L. T. 743, follows the same lines as *Parker* v. *Butcher* (*supra*). It decided once again that fines at the rate of 5 per cent. per month were reasonable and therefore enforceable. Furthermore, as the rules provided for fines on the total amount in arrear for principal, interest, and other payments, fines in arrear themselves attracted further fines. It is established by this and other decided cases that interest on fines may be obtained if expressly bargained for by the rules (though not otherwise); see *Provident Building Society* v. *Greenhill* (1878), 9 Ch. D. 122; and *Ingoldsby* v. *Riley* (1873), 28 L. T. 53.

There are two cases which indicate that the Courts regard as unreasonable a rule providing for fines progressively cumulative according to an increasing rate. In *Lovejoy* v. *Mulkarn* (1877), 37 L. T. 77 (C. A.), the Table of Fines appended to the society's rules purported to show the fines which borrowing members were liable to pay on default of payment of their monthly subscriptions and interest on shares from one to ten, for a period of from one

to six months, the fines being progressive from month to month (6d. per share for the first month, 1s. per share for the second month, 2s. for the third, 3s. for the fourth, 4s. for the fifth and 5s. for the sixth month), but there was no express provision in the Table or the rules, for fines for the seventh and subsequent months. A mortgagor, holding twenty-eight shares of £50 each, fell into arrear for five years and then claimed redemption. The society put in an account, based on the "progressive rate principle", if I may call it so, of a fine of 6s. per share for the seventh month, 7s. per share for the eighth month, and so on, making up a neat little total of £2,939 for fines. It was held that, according to the true construction of the Table of Fines, the fines were not to increase after the sixth month, so that what the society was entitled to for fines was the sum of £420 (that is, sixty instalments, on a holding of twenty-eight shares, at 5s. per share per instalment). In the Court of first instance, the strictures of Jessel, M.R., on the "progressive rate principle" were severe, as one might expect. He said "Nothing is better established than this, that in the Court of Equity you cannot enforce a penalty for non-payment of money by a given day. You can obtain interest, but you cannot even obtain increased interest, that being considered a penalty. . . . If, therefore, this was a mere contract for a loan between the borrower on mortgage and this benefit building society, and there was no general law on the subject, that part of the contract which enables the society to charge a fine to the borrower for the non-payment of the money on the day, in addition to the interest, would be void in the Court of Equity. That I take to be clear. . . . If they are entitled to charge a fine or penalty at all, it must be by virtue of some statute which has broken in upon the rule of equity, and there is such a statute". He cites the Act of 1836, and then points out what enormous rates and amounts of interest the "progressive rate principle", as I venture to call it, would yield when each instalment became due. He continues—"Now this is the account which is literally brought into my chambers, and under it they claim between £4,000 and £5,000 as due for this loan of £1,400 at the end of five years and this is what I am to adjudicate upon. All I can say is that if this is within the rules, in my opinion, it is not within the Act of Parliament and is wholly unreasonable. It is therefore not protected by the Act from the rule of equity that you cannot get a penalty at all for non-payment of money at a given day, and therefore they could not get the fine in that way. That appears to me to dispose entirely of the argument in that shape.

There is another way of dealing with the question, and that is to construe the rules with an anxious desire to make them reasonable and lawful . . . . It seems to me a reasonable notion that they should not allow their mortgagor to go in default for more than six months. They should sell the property and realise it. . . . Where one interpretation is reasonable and legal—legal because it is reasonable—and the other interpretation makes the rules illegal because unreasonable; where one interpretation which is legal and reasonable is literal, and the other, which is illegal because unreasonable, departs from the letter of the rules, I think it is the duty of the Court to adopt the literal and legal construction ". The learned Master of the Rolls in fact held on construction that no fines whatsoever could be charged after the sixth month, because the Table of Fines did not say anything about fines after six months. But the Court of Appeal, while agreeing with all that he had said about " progressive rate principle ", held that, on the true construction, the fines remained stable after six months, at 5s. per instalment per share, and that the rate did not increase, and that upon this basis the fines were not unreasonable and were recoverable by the society.

A similar case was the Irish one of *Re Tierney's Estate* (1874), Ir. R. 9 Eq. 1. There the rules provided for " fines at the rate of 3d. per share for the first month, and for each succeeding month 3d. per share additional on such repayments ". The mortgagees attempted to charge the borrower fines increasing in arithmetical progression. It was held that on such a computation the fines would not be reasonable within the meaning of the Act of 1836, and that, as the rules admitted of a different and a reasonable construction, such a construction should be adopted.

Now admittedly things do not normally go to extremes in practice. Building societies usually sell before things get too bad; or, if there is power to forgive fines, they frequently draw a line after a time and claim nothing further. But they are not bound to act in this generous and business-like way. They need not release, and in some cases they perhaps have no power to release, and then, as we have seen, they must not attempt to release. We have to consider what they must do or may, at the worst, do.

As an actual modern illustration of concrete figures, we may take a somewhat extreme case which recently came before the Lancashire Chancery Court, *Hoborby's Case* (unreported) (*a*). The facts were shortly as follows. During the years 1934 and 1935, the borrower raised from an incorporated society sums

(*a*) Liverpool District, 1948, Letter E, No. 5758. (Judgment delivered on May 15, 1950.)

totalling £2,900 on the security of seven mortgage deeds, all in like form, charging various properties. Each mortgage deed contained the usual provisions for repayment by fixed instalments per month, with a covenant to pay all such other subscriptions, fines and payments (if any) as according to the rules of the society for the time being in force or by that deed might become payable, and there was a covenant to perform and observe the present and future rules and regulations of the society. The rules in force up till 1945 provided that, in case any member holding mortgage shares should "neglect or refuse" to pay the subscriptions due thereon or any other moneys due from him to the society, he should pay a fine for every such "neglect or refusal" at the rate of 2½ per cent. per month on the amount by which the subscriptions or other moneys should be in arrear. In 1938, the mortgagor being in arrear, the society entered into possession and had remained in possession ever since. The rents and profits were usually insufficient to keep down the instalments, so fines began to accrue and the total debt commenced to mount up, at first gradually, but then more and more rapidly until the pace had become a gallop. The net result of this galloping consumption was that by 1949 the society's account showed that only a few pounds had been paid off the principal sum of £2,900, interest in arrear was £1,500, and fines amounted to no less than £2,800. The case is cited merely to show what the figures may (according to the precedents) quite lawfully be, if this 2½ per cent. per month runs on for a few years, even with the society in possession and drawing such rents as there are. The decision entirely turned on questions of construction of the rules, which questions the learned Vice-Chancellor, Sir Leonard Stone, decided, and as a result some relief was given to the borrower. But the important matter for present purposes is that in a Court of first instance the fundamental point which is the subject of this investigation could not be taken; it had to be assumed, in view of *Parker* v. *Butcher* (*supra*) and all other cases, that fines of 2½ per cent. per month were reasonable, for however long they might be fruitful and multiply.

Let us approach the question from the other side. Penalty connotes punishment. As was said in *R.* v. *Smith* (1862), Le. & Ca. 138, the word "penalty" is large enough to mean, is intended to mean, and does mean, any punishment. In civil cases the notion of penalty is contrasted with the notion of compensatory damages; a penalty is a sum to be inflicted as a punishment, irrespective of any damage sustained. "Where a sum is payable as a punishment

for a default, or by way of security, and the realisation of that sum is not within the original intention of the parties, the sum is a penalty": *Protector Endowment Loan and Annuity Co.* v. *Grice* (1880), L. R. 5 Q. B. D. 592 (C. A.), at p. 596, (*per* Bramwell, L.J.). The distinction is so well known that it need not be laboured; the essence of a penalty is a payment of money stipulated as *in terrorem* of the offending party. It is not always easy to say whether a stipulated sum is a penalty or an estimate in advance of probable damage. But the following quotation is important:—

> "It will be a penalty if the sum stipulated for is extravagant and unconscionable in comparison with the greatest loss that could conceivably be proved to have followed from the breach":

per Lord Dunedin in *Dunlop Pneumatic Tyre Co., Ltd.* v. *New Garage & Motor Co., Ltd.*, [1915] A. C. 79, at p. 87.

It is no part of the case here made to suggest that building societies, whether incorporated or unincorporated, normally act like unconverted Scrooges. They serve a most valuable purpose in advancing a high proportion of the value of the property mortgaged and in allowing repayment by small instalments spread over a long period. Both business honour and business interest concur in making the case which appears unfair also the exceptional case. Societies know that a high reputation is essential for business, and are jealous to preserve such a reputation. Furthermore, since the initial advance is, as mentioned above, usually a high proportion of the value of the property given in security, there is little margin if things go wrong, and a quick sale before there is an unsecured deficit pays better than the running up of enormous fines which may never be met. If sales are deferred, there is usually a good reason for the deferment, such as the hope that the property will improve in value, or the difficulty of effecting an immediate sale. And in such circumstances societies are usually generous in exercising their remitting power with regard to fines, if they have such a power.

But as a matter of legal principle we are concerned not with what societies normally do, but with what a hypothetical extortionate society might do. Is the line of cases correct in principle which says that interest at 30 per cent. per annum on current arrears may be charged indefinitely—or, worse still, 60 per cent. per annum? Or, even worse again, that interest may be exacted on such unpaid fines?

It is strongly urged in the first place that it is no answer merely to say that the parties have agreed expressly to certain

terms, or (to use words admittedly applied in a different context) "the bargain is in favour of the mortgagees: the mortgagors have only themselves to blame if they put themselves to inconvenience by neglecting to discharge their obligations in accordance with the tenor of the instrument by which those obligations are expressed"—*Leeds & Hanley Theatre of Varieties* v. *Broadbent*, [1898] 1 Ch. 348 (C. A.), at p. 349. A penalty could not be exacted at all unless it has been expressly agreed to, but once the term is found to involve a penalty it will not normally be enforced, (the abnormal case being if there is statutory authority for the penalty).

All proper weight must be given to the principle stated by Lord Birkenhead, L.C., in *Maclaine* v. *Gatty*, [1921] 1 A. C. 376, at p. 386—"It would be undesirable and dangerous that Courts of law should set up an elastic and from the nature of the case an undefinable judicial discretion in substitution for the expressed agreement of the parties to the instrument". But once the Court discovers a penalty in the expressed agreement, then that expressed agreement cannot normally be enforced. It is true that normally a borrowing member of a building society is both a member bound by the rules and also a mortgagor bound by his mortgage. But in either aspect it is submitted that he should be bound only within limits. In company law there are rules enabling a member who complains of oppression by a majority to obtain relief. In much the same sort of way, an ordinary mortgagor is not bound by provisions in his deed which are oppressive as unreasonably clogging the equity, and, in particular, as providing for a penalty. *Salt* v. *Marquis of Northampton*, [1892] A. C. 1; *Kreglinger* v. *New Patagonia Meat & Cold Storage Co.*, [1914] A. C. 25; *Santley* v. *Wilde*, [1899] 2 Ch. 474; and see cases cited *ante*. The Moneylenders Acts give express power to relieve against harsh and unconscionable bargains; why should not a borrower from a building society be afforded the opportunity to ask for relief? The provisions of his contract may be clearly penal; there may in extreme cases be a species of oppression, oppression of one body, the borrowing members, for the benefit of another body, the investing members.

It is also respectfully urged that it is again no answer to say, as was said in *Parker* v. *Butcher* (*supra*), that "it is no doubt a high rate of interest, but it is one imposed to enforce regularity of payment". For the main object of any penal provision is to enforce prompt payment, by acting *in terrorem*, and the main rule about a penal provision normally is that it is unenforceable. In

fact, moreover, it may be suspected that the sanction of fines, as stated in *Parker* v. *Butcher* (*supra*), weakens if things get too bad for the borrower. A borrower need not always be rich and stubborn, he may be willing but poor. If fines accumulate too far, he may give up all hope of paying off the debt, and let things take their course.

On the existing case-law it must be admitted that fines at the rate of 30 per cent., per annum, or at double that rate will be held reasonable and enforceable. But let us examine such fines a little more closely. The "progressive rate principle" in the sense dealt with above does not apply, for the rate remains constant. Any "progressive" element is related to (a) the time factor, in conjunction with (b) the high rate of interest, (c) operating on a continually increasing sum, and not to any continuing increase in the rate of the fines. No one would be inclined to object very strenuously to payment of a few shillings in respect of fines at 2½ per cent. per month for the first month or so, but if the *arrears* go on mounting up and the fines mount up with them and because of them, the position becomes intolerable. As Scrutton, L.J., pointed out in *Reading Trust, Ltd.* v. *Spero*, [1930] 1 K. B. at p. 503, where a loan is for a short term the rate of interest per annum is deceptive. "To pay sixpence for the loan of a pound for a week does not sound harsh and unconscionable, but it is at the rate of 130 per cent. per annum." Without the concurrence of the three factors (time, high rate, and non-discharge of arrears), little injustice is likely. Thus (a) if the property is soon sold or redeemed, the fines will be small; or (b) if the borrower from time to time reduces his arrears, there will be little for the fines to operate upon; or (c) if the rate of fines is small, fines will not become too exorbitant.

Another important point is as follows. Ordinary compound interest is at the *same* rate throughout, that is, in so far as interest is given upon interest, it is at the same rate as the original interest on principal. But with fines this is flagrantly not so. The ordinary instalments are calculated to give interest spread over a number of years at some moderate rate like 4 per cent. or 5 per cent., but the fines on arrears are at such enormous rates as 30 per cent. or, quite easily, more than that. The system is much more onerous than compound interest.

In view of the three factors, time, high rate, and increasing basic figure on which fines are calculated, one can only adjudicate upon the reasonableness of a "fine" clause of this type by taking all these three factors into consideration.

III. *Apportionment.*

If a system of fines is unreasonable in its operation, should apportionment be possible? In view of the peculiar nature of the unreasonableness in the type of case especially under consideration, dependent on the high rate coupled conditionally with time and with mounting arrears, this seems essentially a proper case for apportionment.

With great respect, the writer makes the suggestion that the solution given by the *Parker* v. *Butcher* (*supra*) and *Re Middlesbrough* (*supra*) line of authorities is too simple. The monthly instalments under building society mortgages are composite; each contains some principal and some interest, at first nearly all interest, and as time goes on the proportion veering more towards principal. The interest, spread over all the instalments during a period of years, is usually at some rate like 4 per cent. or 5 per cent. per *annum*. If a default is made, the fine of $2\frac{1}{2}$ per cent. per *month* comes into operation. This represents additional simple interest at a very high rate on that part of the instalment in arrear which is capital, and interest at the same high rate on that part of the instalment which is interest. Worse still, if the fine is not paid and a fine becomes chargeable upon the fine, then the element of "*interest upon interest upon interest*" makes its appearance. If the position is not put right by payment at an early date, things soon get out of hand. If things may get out of hand, it is submitted that the Court ought to have the power to regulate matters and to give relief if it considers it equitable to do so.

The analogy of the position under the Moneylenders Acts, 1900 to 1927 (63 & 64 Vict. c. 51, and 17 & 18 Geo. 5, c. 21) must not be pressed too far, but some principles laid down by those Acts and worked out in the numerous cases decided under them ought to be referred to at this point. The general principle is that if the Court is satisfied that the interest charged is excessive and that the transaction is harsh and unconscionable, or is otherwise such that a Court of Equity would give relief, the Court may re-open the transaction, and relieve the borrower from payment of any sum in excess of the sum adjudged by the Court to be fairly due, as the Court, having regard to the risk and all the circumstances, may adjudge to be reasonable (Act of 1900, s. 1). The rate of 48 per cent. per annum is to be a critical point in the scale. If the interest charged exceeds that rate, the presumption is against the lender, and he must satisfy the Court that the transaction is fair, though he may, of course, discharge that burden. If the interest charged

does not exceed the rate of 48 per cent. per annum, the presumption is against the borrower and he must satisfy the Court that the transaction is unfair, though he may, of course, discharge that burden (Act of 1927, s. 10). Many of the circumstances which the Courts should and do consider are, however, practically irrelevant so far as building society mortgages are concerned, such as the relative positions of the parties, disparities of age, intelligence or education; any trickery or undue pressure; the purpose for which the loan is required; the risk to the lender; whether the borrower fully realises the nature of the transaction; whether he willingly enters into it, or is under such a pressing necessity for cash that he is not really a free agent; or what is a reasonable rate of interest if there is no security.

On the other hand, in building society loans there is a certain uniformity, for (1) the borrower, wishing to purchase a house, borrows for that purpose and gives the house as security, (2) there are standard terms for all borrowers. But within this limited framework it is submitted that several principles under the Moneylenders Acts are not entirely irrelevant to our present purpose:—

(i) By section 7 of the Act of 1927 it is enacted that "subject as hereinafter provided, any contract made after the commencement of this Act for the loan of money by a moneylender shall be illegal in so far as it provides, directly or indirectly, for the payment of compound interest, or for the rate or amount of interest being increased by reason of any default in the payment of sums due under the contract; Provided that provision may be made by any such contract that if default is made in the payment upon the due date of any sum payable to the moneylender under the contract, whether in respect of principal or interest, the moneylender shall be entitled to charge simple interest on that sum from the date of the default until the sum is paid, at the rate payable in respect of the principal apart from any default".

(ii) The rate of interest charged may be so excessive as of itself to render the bargain harsh and unconscionable. In *Re A Debtor*, [1903] 1 K. B. 705; *Poncione* v. *Higgins* (1904), 21 T. L. R. 11; *Wells* v. *Allott*, [1904] 2 K. B. 842; *Carrington's, Ltd.* v. *Smith*, [1906] 1 K. B. 79.

(iii) Whether a loan is secured or unsecured is a fundamental point in considering whether the rate of interest is excessive or not, and a rate which might not have been regarded as excessive for a loan on personal security only, becomes outrageous and extortionate for an advance upon good

security: cases cited *supra*, also *Kruse* v. *Seeley*, [1924] 1 Ch. 137; *Verner-Jeffreys* v. *Pinto*, [1929] 1 Ch. 401; *Reading Trust, Ltd.* v. *Spero*, [1930] 1 K. B. 492.

It is submitted that, although fines may certainly be charged by building societies, they ought nevertheless to be reasonable, the conception of reasonableness here being sometimes a special one, owing to the time factor operating on mounting arrears. A "fine" clause may contain the seeds of injustice in itself, and one can see *ab initio* what may happen. From what may happen or does happen one may judge whether the clause should be treated as wholly good, wholly bad, or some *tertium quid*. At present the Court does not seem to have power to consider any *tertium quid*. It may either say that the "fine" clause is wholly unreasonable and void and refuse to give effect to it at all, in which case the society rather unfairly receives no interest at all upon arrears, or it may say that it is valid, and then, no matter how it works, the Court cannot control it, and this sometimes works very unfairly against borrowers. There is no power to give equitable relief by reducing accrued fines to moderate dimensions.

There are in fact different types of "fine" clause, all containing to some extent the potentialities of penalties, but in differing degrees. There is the "fine" clause which provides for such an unreasonable system of fines *ab initio* that the Court would almost certainly hold it to be bad, such as a provision for very large fines from the start, out of all proportion to the arrears, and perhaps not based on the arrears at all. There is the system based on the "progressive rate principle" which is also bad. There is the "fine" clause which maintains a flat rate of moderate dimensions on arrears, such as the cautious clause given in the model form in *Wurtzburg*, which imposes 2d. per pound per month. The "fine" clause with which we are primarily concerned, the $2\frac{1}{2}$ per cent. (or 5 per cent.) per month on arrears, is of the same general character as the 2d. per pound type, but at a higher percentage.

One must keep firmly in mind, at this stage, the distinction between the clause which operates unreasonably from the start and the clause which imposes a system of mounting fines which may, if it works long enough, operate unjustly and unreasonably. In the case of the clause which itself is unreasonable, in the former sense, the Court would appear already to have the power to declare the clause unreasonable and void (if fines must be reasonable, as we assume). But what appears to be lacking is the power, short of declaring the clause wholly bad, to "tax" fines which have accumulated to an extortionate figure by the

operation of (a) high basic rate, (b) on increasing basic figures, (c) over a length of time. In short, there should be not only a power to declare a *clause* void, but a power to cut down accrued *fines* to a reasonable amount.

In so far as the principle of compensation for loss is present, the fines should be good. In so far, beyond that, as the principle of penalty is present, it depends on the view the Court takes of "unreasonable penalty". Accordingly:—

(1) From the point of view of the society, if an instalment is not promptly paid, the society should have interest at a proper business rate on that instalment until it is paid. This rate should cover the greatest loss that could reasonably be deemed to have followed from the default. That does justice to the society.

(2) What of the borrower? Anything beyond what is allowed under the first head is in its nature a penalty. In this particular instance it is not necessarily bad, for Parliament may have intended to punish defaulters, and not merely to compensate societies. Therefore, if it is, in the particular circumstances of a case, reasonable to allow a moderate penalty beyond what is allowed under the first head, then allow it. But as the "fine" for the purposes of the statute comprises *both* headings, the total should be reasonable. On what principle of compensation is it reasonable to allow to societies interest at 30 to 60 per cent. per annum on mounting arrears? On what principle of punishment is it reasonable to allow borrowers to be mulcted at a similar rate? Assume, if you will, that Parliament authorised moderate punishment; but did Parliament intend to allow cases where in a few short years fines equal principal?

Probably in most cases substantial justice would be done if certain simple rules were enforced, namely:—

(a) Due notice of the contingent or incurred liability for fines ought to be given both to prospective borrowers and to defaulting mortgagors. Not only should application forms set out clearly what the system of fines is to be, but every so often (possibly every three months) specific notice in writing should be given to the defaulting mortgagor of the fines which he has incurred.

(b) Fines should not be at a higher rate than, say, 5 per cent. above the initial rate of interest charged on principal, unless the Court sees special reason to the contrary.

(c) All payments or receipts should be credited first against instalments in arrear, and not against fines.

(d) Fines on arrears of fines should be forbidden.

It is a somewhat remarkable thing that when Parliament had building societies in mind in 1939, it did nothing by the Building Societies Act of that year to deal with the present subject.

In view of the many thousands of building society mortgages in existence, the matter is of general public importance. Cases of extortionate demands must be rare, but it is just in the rare case (which does occur), that there ought to be a remedy. In view of the existing state of the authorities, the Courts of first instance would appear to be powerless. It requires either the deliberate overruling of the cases or a short statutory provision giving a discretion to the Judge. Probably the latter solution would be the more convenient and certain, because a borrower who, *ex hypothesi*, has already incurred heavy fines may be very unwilling to go to appeal against a formidable group of precedents, at his own risk as to costs. To give to the Judges a power to award what they consider reasonable would involve no new departure from principle. The Judges already have a similar power under the Moneylenders Acts and under the Inheritance (Family Provision) Act, 1938, to name only two instances.

Costs on the issue of fines ought to be in the complete discretion of the Court. The ordinary rule that a mortgagee is entitled to his costs of ascertaining what is due under the mortgage should not be applicable. Even as it is, the rule sometimes seems to operate in a peculiar way, when a mortgagor has to pay for the privilege of construing the rules of his mortgagee society.

But unless some relief is rendered possible, we may have to add to our highly prized list of Equitable Maxims another maxim, not likely to be so valued, namely, " Equity stops where fines begin ".

NOTES OF RECENT CASES

1. *LAW OF PROPERTY AND CONVEYANCING*

By S. M. Tolson, Barrister-at-Law

Validity of assignment of equitable chose in action—no consideration—not complete and perfect.—" What the writer is saying " (*Snell* (22nd ed.), at p. 57) " and I accept it, is that, if what is done amounts to a gift complete and perfect of a subject-matter which is an equitable chose in action, there is no reason in principle or in authority why the donee should not take the benefit. . . ." These are the words of the Master of the Rolls in *Re McArdle,* [1951] 1 All E. R. 907, in which brothers and a sister entitled in remainder under a will, promised for a past consideration, to pay a sum of money to their sister-in-law out of the estate when it was distributed.

The Court of Appeal unanimously held that although a good assignment of a share of residue could be made without consideration (*Fisher* v. *Calvert* (1879), 27 W. R. 301), the document in question was not intended to be other than a contract, and could not, if presented to the executors show a complete and perfect title to the sum of money. They would be bound to inquire further as to whether the consideration named therein had been performed or not.

This case adds but one illustration to the scant authority on what is meant by " complete and perfect ". The Court made no attempt to explain the general meaning of the words, perhaps because the mode or form of assignment being immaterial, the circumstances are therefore infinitely various.

Sale of land—payment of purchase money into Court—liability to pay interest.—The Court of Appeal, and the Master of the Rolls in an exhaustive judgment have affirmed Harman, J.'s decision in *Pearlberg* v. *May* (noted *ante,* p. 47), [1951] 1 All E. R. 1001. There is no ruling on the authorities that under a so-called *Greenwood* v. *Turner* order (or before its creation when the Court of Chancery gave the purchaser an option between keeping the property or the purchase money) payment into Court is equivalent to a payment to the vendor so as to be a quittance to the purchaser. " I think," said the learned Master of the Rolls, " the Court is doing no more than take the money into its keeping to abide the result of the action . . . both the purchaser and the vendor may fairly say they have equitable interests in it." Thus it was affirmed that the contractual right to interest was still fully effective as between the parties.

Settled land — improvement rentcharge — "redemption" — tithe annuity—"discharge"—Settled Land Act, 1925, *s.* 73 (1) (*xiii*) *and* (*xvi*).—*Re Sandbach* (noted *ante*, p. 48) has been partly reversed by the Court of Appeal, [1951] 1 All E. R. 971. After a detailed discussion of the cases, the Court agreed with Vaisey, J., that the word "redemption" in section 73 (1) (xiii) of the Settled Land Act, 1925, must mean the compounding of future payments and not the payment of instalments as they come due, as the vital words in the earlier Act of 1887 "otherwise providing for the payment" were not used, and it was under that head that the earlier cases were decided.

However, the Court thought that there was no reason why the word "discharge" in section 73 (1) (xvi) should be limited to the same meaning, especially as interest on the annuities in question is expressly excluded from the subsection. There being no provision in the Act or particular circumstances justifying a contrary decision, the Court ordered recoupment by the trustees to the tenant for life of the total sums representing capital which had been paid in discharge of the tithe redemption annuities.

It should be noted that the statement in *Wolstenholme & Cherry* (12th ed.), at p. 1103, the only relevant authority on section 73 (1) (xvi), has been expressly disapproved by the Court.

Consideration—oral evidence of a larger sum.—In the old days a nominal consideration was often put in a conveyance merely to make it good, the real consideration was not intended by the parties to be embodied in the deed. This was the origin of the rule in *Clifford* v. *Turrell,* 1 Y. & C. Cas. 149, recently upheld by the Court of Appeal in *Turner* v. *Forwood,* [1951] 1 All E. R. 746, whereby proof of the real consideration is admissible in evidence if it does not contradict the deed.

In *Turner* v. *Forwood* the plaintiff was able to recover £1,215 which had been orally promised him by the defendant, though the consideration in the deed, releasing certain rights executed at the same time as the promise was given, was only 10s.

Assignment of lease—implied covenants for title—knowledge of defects—rectification.—Danckwerts, J., decided in *Butler* v. *Mountview Estates, Ltd.,* [1951] 1 All E. R. 693 (see article on p. 141) that where a vendor in a contract for sale exempts himself from liability for failure to comply with certain covenants for title, and then makes conveyance unqualifiedly "as beneficial owner", notwithstanding that the purchaser has a *prima facie* right to damages (*Page* v. *Midland Ry.,* [1894] 1 Ch. 11), rectification of the conveyance may be ordered against him, even though the matter is not raised by counterclaim in the defence, as the contract contains the expressed intention of the parties.

Mortgage to facilitate purchase — prior tenancy agreement — estoppel—estate contract—Law of Property Act, 1925, *s.* 199 (1).— A contracted to buy a dwelling-house with vacant possession. She then agreed with B and C that they should surrender the tenancy of another house of hers in consideration of a weekly tenancy of the new house. A then arranged that a building society, the plaintiffs, should advance money on mortgage in order that she might complete the purchase of the property. She disclosed to them that she was getting vacant possession of the property but not her agreement with B and C. Two days before completion, B and C were let into possession with a rent book. On completion the mortgage was executed, excluding the statutory power of leasing, and A attorned tenant. The plaintiffs then sought possession of the premises. These were the facts in *Coventry, etc., Building Society* v. *Jones,* [1951] 1 All E. R. 901.

Harman, J., having pointed out that A had only an equitable interest in the property when she made her agreement with B and C, decided firstly, that he could not assume that there was a *scintilla temporis* between the conveyance and the mortgage so as to vest a tenancy by estoppel in favour of B and C. The conveyance and mortgage were one transaction. There would have been no conveyance without the mortgage.

Secondly, he held that as the agreement was an estate contract under section 10 (1) (*c*) (iv) of the Land Charges Act, 1925, the plaintiffs were not affected by the constructive notice they had of the agreement by virtue of the two days occupation prior to completion of the purchase. There had been no registration and the plaintiffs were protected under section 199 (1) of the Law of Property Act, 1925. Section 14 of the Act protecting persons in possession, whatever its meaning, only extends to the first part of the Act.

Thus, the plaintiffs were entitled to possession as against B and C.

Consent to express power of advancement—forfeiture.—" To suppose that by giving effect to the power of advancement the husband committed a forfeiture under the previous forfeiture clause would to my mind be perfectly absurd, and would be failing to give an intelligent construction of the whole of the settlement," said Neville, J., in *Re Hodgson,* [1913] 1 Ch. 34, whose judgment has been followed by Harman, J., in *Re Shaw's Settlement* and *Re Wisely's Settlement,* [1951] 1 All E. R. 656. There were two summonses on the same point, namely whether on the construction of pre-1925 settlements the consent of the life tenant to the trustees' exercise of an express power of advancement caused a forfeiture of his life interest.

The learned Judge distinguished *Re Simpson's Trusts,* [1931] 2 Ch. 77, which has previously given rise to doubt on this point, largely because the reasons for the decision in question were not reported. In the latter case, although the settlement was made before 1925, there was no express power of advancement, and Luxmoore, J., had to decide what was the effect of the exercise of the statutory power contained in section 32 of the Trustee Act, 1925, a circumstance which the testator could not have had in mind.

This is but another example of the golden rule that the document must be construed as a whole, so as best to give effect to the intention of those making it.

Section 36 (6), *Trustee Act,* 1925—*appointment by appointor of himself.*—In *Re Power's Settlement Trusts,* [1951] 1 All E. R. 932, Wynn-Parry, J., decided that section 36 (6) of the Trustee Act, 1925, as it does not contain, like section 36 (1), express permission for the donee to appoint himself, must be construed as having the contrary meaning following, *inter alia*, but especially, *Re Samson,* [1906] 1 Ch. 435. In the latter case, the same words in the Trustee Act, 1893, s. 10 (1) " appoint another person or persons " were so construed.

The learned Judge came to his decision with some reluctance, and it seems desirable that his suggestion of an amendment to the Act, or preferably a review by a higher Court should be adopted. In present times when the duties of trusteeship are not lightly undertaken, it seems unfortunate that a party willing to act should be excluded.

Registered land—rectification.—The meaning of " substantially contributed . . . by neglect . . . to the mistake " in section 82 (3) (*a*) of the Land Registration Act, 1925, as interpreted in *Chowood* v. *Lyall,* [1930] 2 Ch. 156, has received considerable extension recently in *Re 139 High Street, Deptford,* [1951] 1 All E. R. 950. Wynn-Parry, J., ordered the rectification of the register, as although no plan had been submitted to the Land Registry, it seemed from the physical appearance of the property that it included land belonging to the applicants. In fact the only access to the applicant's property was through the respondent's property.

The Land Registry, the respondent's vendors and the respondent fell into the mistake partly because the premises had been derelict at the time of purchase, but the applicant had in fact a good paper title over 100 years old, which had never been registered as no transaction had been made with regard to it.

The learned Judge considered that the physical appearance of the land was the determining factor, which had in fact deceived the Land Registry officials, and that the respondent had contributed to the mistake within section 82 (3) (*a*) when he applied for first registration by giving a merely general description of the premises.

The learned Judge considered also that though section 82 (3) (*b*) concerning void dispositions, had no application to the case, section 83 (3) (*c*) [had section 83 (3) (*a*) not applied] gave the respondent no protection. In the words of the latter subsection, in this particular case it would not in the circumstances be unjust to rectify against him, as he would be properly protected by his right to claim an indemnity.

It will be interesting to see whether the right to claim indemnity is contested in view of *Re Chowood,* [1933] 1 Ch. 594. This case presumably could be distinguished from it, as the conveyance to the respondent was apparently not subject to any special conditions

limiting the vendor's liability, and it could be said that the respondent had lost something by having the register rectified against him.

Settlements—payment out of share premium account, capital or income.—Harman, J., has decided in *Re Duff's Settlement Trusts*, [1951] 1 All E. R. 869, that money paid out of a share premium account as provided by section 56 of the Companies Act, 1948, is a capital asset in the hands of a trustee.

The learned Judge said: "The section has, in fact, produced a novel type of capital, distributable only by the same process as any share capital, and having in the hands of those who receive it the quality of capital".

Sale of land—principal and agent—fraud.—In *Armstrong* v. *Strain*, [1951] 1 T. L. R. 856, Devlin, J., found himself bound to decide between two conflicting decisions of the Court of Appeal, *London County Freehold and Leasehold Properties, Ltd.* v. *Berkeley Property and Investment Co., Ltd.*, [1936] 2 All E. R. 1039 and *Gordon Hill Trust* v. *Segall*, [1941] 2 All E. R. 379. After an exhaustive inquiry into the earlier cases and the general principles laid down in *Derry* v. *Peek*, 14 App. Cas. 337, he followed the later case, and decided that there is no way of combining an innocent principal and agent so as to produce fraud.

X owned a bungalow which had frequently subsided and been underpinned. He asked Y to sell it for him saying nothing about its condition. Y knew nothing except of the most recent underpinning. Y with X's approval asked Z to co-operate in selling the bungalow. Y told Z what he knew. The plaintiffs, who subsequently purchased the property were told by Z that half the purchase price would easily be forthcoming on mortgage. Soon after completion the bungalow became uninhabitable.

The learned Judge decided that no warranties had been made, and that though Z's statement was a false material representation of fact as to the value and therefore as to the condition of the property, none of the three defendants were by themselves guilty of fraud, nor could the knowledge of X added to the representation made by Z amount to fraud. *Cornfoot* v. *Fowke*, (1840) 6 M. & W. 358, which is the authority for the latter proposition, has never in fact, on the point in issue, been clearly disapproved apart from in the *London County's Case* (*supra*). The greatest of weight of *dicta* shows that knowledge in fraud must amount to *mens rea*. Fully conscious knowledge of the fact in question, actual dishonesty, must be proved (*Angus* v. *Clifford*, 7 T. L. R. 447). "It is precisely that conscious knowledge," said the learned judge, "which can never be present in an innocent division of ingredients."

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2. *CHARITIES*

Relief of poverty — poor relations — public benefit — "needy circumstances".—Re Scarisbrick (*ante*, Vol. 14, p. 66) has now been reversed in the Court of Appeal: [1951] 1 All E. R. 822. The case turned upon a bequest for relief of poor relations and was held by Roxburgh, J., to be invalid since it was not perpetual and lacked the public element. The case was elaborately discussed by the learned Judges in the Court of Appeal who held that there was no foundation in the older authorities for any distinction between trusts having perpetual continuance and trusts for distribution within a limited period, and furthermore, that the authorities in favour of charitable trusts for poor relations were too well established to be overruled by the Court of Appeal. It was also suggested (*per* Evershed, M.R., at p. 829) that there was authority for the view that the House of Lords would be disinclined to overrule this line of cases.

It should be pointed out that Evershed, M.R. (at p. 829), was emphatic that this example is an exception to the general rule which requires benefit to the public or to a section of the public. Jenkins, L.J. (at p. 837), pointed out that this exception applies whether the personal tie between the benefactor and the beneficiaries is one of blood or one of contract, as in the relief of poverty among members of a particular society, as in *Spiller* v. *Maude* (1881), 32 Ch. D. 158, or employees of a particular company: *Gibson* v. *South American Stores*, [1950] Ch. 177 (*ante*, Vol. 14, p. 66). Since these cases have been treated as anomalous they must be regarded as exemplifying the importance of the public element in charitable gifts, which has recently received so much emphasis in the Courts, and as indicating the limits of "public benefit". There is a valuable analysis of this aspect of the matter by Jenkins, L.J., at p. 837.

The gift was for relations in "needy circumstances" and it was argued that to the testatrix this implied something much less than poverty and consequently that the trust was not for the relief of the poor. It was held, however, that "needy circumstances" meant "poor" and that, therefore, it was good on that ground.

In *Re Coulthurst's Will Trusts*, [1951] 1 All E. R. 774, a gift for the benefit of widows and orphans of deceased officers and ex-officers of Coutts Bank was held to be charitable by the Court of Appeal. The question of "public benefit" was not seriously discussed, but "relief of poverty" received examination at the hands of the Master of the Rolls. It is something short of destitution, but implies that the beneficiaries will "go short", "due regard being had to their status in life and so forth": *per* Evershed, M.R., at p. 776.

NOTE

The Perpetual Character of Charity: A Rider

The Court of Appeal in *Re Scarisbrick*, [1951] 1 All E. R. 822, have held that a gift for immediate distribution among a fairly large class may be a charitable gift in relief of poverty. The principle is very clearly stated in the judgment of Jenkins, L.J., at pp. 840–841.

The point concerns the presence or absence of a charitable intention. Generally, the " impersonality " of a gift is shown by provision for a large class over a long indefinite period. But if " the class of potential beneficiaries becomes so wide as to be incapable of exhaustive ascertainment, the impersonal quality, if I may so describe it, supplied in continuing gifts by the element of perpetuity is equally present. . . . The presence of perpetuity may aid the inference of charitable intent, but, where a charitable intent is otherwise to be inferred from the terms of the disposition, the absence of perpetuity is surely immaterial ".

It must be remembered that the creator of the trust intended immediate distribution in this case, and not a perpetual provision. The decision in no sense weakens the rule that, if a settlor means perpetual provision to be made, the trust fund will not be applicable for immediate distribution. The law prefers to do violence to the terms of the charitable trust rather than foreshorten its duration. It is common in these days of rising costs for a testator to leave a sum or devise land for charitable purposes which are too ambitious, or to leave unproductive property which is impossible to maintain. A good case is *Re McGwire,* [1941] Ir. R. 33, in which a house was devised to a charity to be used as a sanatorium. The funds were, instead, applied *cy-près* since the house required alterations for which the testator had made no provision. Black, J., held that the conversion of the house into a sanatorium would require a capital expenditure which would " practically exhaust the funds, the subject of the trust, and leave very little for upkeep and maintenance ". A general charitable intention appeared, so *cy-près* application was made by adding the income of the house to the income of other charitable funds being used for the provision of sanatoria. If no general charitable intention appears the entire gift may fail if it is impossible to operate the house for the charitable purpose, for lack of other funds for its maintenance (*Re Packe,* [1918] 1 Ch. 437).

In practice the Charity Commissioners will not approve a scheme which involves supplementing inadequate income from capital and so eventually destroying the trust fund.

Where the testator has not made it clear that he intends a perpetual foundation it seems arguable, after *Re Scarisbrick* (*supra*), that his intentions might often be more closely followed by a temporary provision corresponding to his plan rather than by throwing the income of his property into the upkeep of some other existing charity.

A. K. R. K.

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3. *PLANNING CASES*

Enforcement notice — no appeal within specified time — later challenge.—In *Perrins* v. *Perrins,* [1951] 1 All E. R. 1075, a Divisional Court has held that, if an enforcement notice is served and no appeal is lodged within the appropriate time specified in the notice (not to be less than twenty-eight days) the validity of the notice cannot subsequently be questioned, if proceedings are taken upon it. In this case the enforcement notice required the use of the land as a

caravan site to be discontinued. On a prosecution for failing to comply with the notice the occupiers had pleaded that this was a valid use of the land and the justices went into the question whether or not the use was valid. On a case stated the Divisional Court held that the question could not be re-opened.

This is a very important decision if it stands and is followed through logically. The effect of an unchallenged enforcement notice would appear to be to destroy an existing valid use. It does not institute a new use. Consequently, the question then becomes difficult to decide what, if any, use is available. For example, suppose a block of flats is lawfully being used for offices, but an enforcement notice is served and remains unchallenged. The lawful use as offices is apparently extinguished, because in the words of Goddard, C.J. (at p. 1076), " the Town and Country Planning Act, 1947, is too clear for argument on this point ". But, of course, a residential use was not, prior to the notice, a valid use and it is submitted that an enforcement notice cannot make it so whatever the authority intended. It may be that in such a case there can be no valid use until a planning permission is obtained.

The other important point is that so valuable a right as a lawful use can be extinguished by *twenty-eight days* failure to take action. This is something new in the land law. The situation is rendered more confused, because the notice can specify a longer time than twenty-eight days, and the Planning Authority can extend the time after the period specified in the notice has elapsed.

No doubt to some extent the sort of problems mentioned here will be modified by the use of administrative discretion. This will in due time alter the character of property " rights ".

A lesser point is that an enforcement notice appears to become effective once for all and it is not necessary to serve a new enforcement notice if proceedings are taken more than six months after the date of notice.

Central Land Board—compulsory power to purchase at existing use value.—Earl Fitzwilliam's Wentworth Estates v. *Minister of Town and Country Planning* (*ante*, Vol. 14, p. 311), has been affirmed by the Court of Appeal, but on wider grounds: [1951] 1 All E. R. 982. Birkett, J., had upheld a compulsory purchase order where land had been refused for development at an existing use value price, but had suggested that he would have quashed the order had it been an attempt simply to enforce a policy of sales at existing use value. His point was that the Central Land Board had no power to enforce such a policy. The Court of Appeal (Denning, L.J., diss.) held that the Central Land Board could enforce compulsory purchase in order to maintain sales at existing use value, since this affected its functions in determining development charge, and that, therefore, any compulsory purchase was made for the purpose of the function of the Board.

The majority opinion assumed that such a purpose was within s. 43 (1) of the 1947 Act as forming part of the functions of the Board to obtain development charge and, therefore, it was not necessary to pray in aid the special purposes of " testing the market ",

etc., referred to in s. 43 (2). Denning, L.J., in a much more elaborate judgment analysed the purposes for which land could be compulsorily purchased and held that this was not possible under the Act merely to carry out a policy of " sales at existing use value " instituted by the Minister. In the meantime, however, the Central Land Board appear to have been given full power to intervene where sales are taking place above existing use value.

Development charge — method of assessment — " curtilage ". — *Sinclair-Lockhart's Trustees* v. *Central Land Board,* 1 P. & C. R. 320, though a ruling of the Inner House of the Court of Session, may become an important decision in the problem of development charge. In effect the Central Land Board included in their assessment not only land which was going to be developed, but other appurtenant land which was not included in the application. The Inner House by a majority held that there was nothing in the pleading to show that the Central Land Board had exceeded their jurisdiction and the appeal was dismissed. The important point, however, appears to be in their Lordships' views on what can be included in the valuation, because it appears that, if it cannot properly be included in the valuation, the valuation is invalid. It is true that the Scottish Act and the English Act are not identical, but it is thought that they are sufficiently close for general purposes. The Lord President took the view (at p. 325) that the " land " to be valued for the purposes of development charge under (s. 70 (2) of the English Act) should be regarded as a " *unum quid* ", that is, according to its present position with regard to other land owned by the applicant. He instanced a farm (a farmhouse was in point) with only an old farmhouse and a farm with a new farmhouse, though obviously the actual land developed was only that upon which the house was developed. The learned Judge pointed out that, perhaps, a large farm would be more greatly benefited than a small farm. It must, however, be borne in mind that in Scots law a farmhouse is in a position different from English law and this may affect the method of valuation, because in Scots law a farmhouse is an integral part of a farm. With regard to an ordinary dwelling-house the Lord President was of opinion (at p. 324) that the Central Land Board could assess the charge on the footing that a suitable garden and curtilage would be provided notwithstanding that this had been omitted from the plan on the application.

Assuming that this decision stands it will obviously be desirable to define the curtilage in the plan on the application. It must be borne in mind that such curtilage cannot apparently be extended without planning permission and possible payment of development charge: *Sampson's Exors.* v. *Notts. C. C.,* 1 P. & C. R. 1.

Claim for depreciation of land value — Central Land Board questions.—It may be convenient to call attention to *Robertson* v. *Central Land Board,* 1 P. & C. R. 312, in which the Inner House of the Court of Session (overruling the Judge of first instance) held

that it was within the jurisdiction of the Central Land Board to put additional questions, including a demand to state the possible development and the value of such development of the land in respect of which a claim is made. It is simply a method of procedure to save trouble and does not operate as a determination of the question. It it not probable that the matter will cause much dispute and therefore no further comment is necessary.

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4. *WILL CASES*

By A. K. R. Kiralfy, Ph.D., LL.M., of Gray's Inn, Barrister-at-Law

Lost will—presumption of revocation clause—probate of earlier will refused.—Re Hampshire, [1951] W. N. 174. In this case a valid will had been executed in 1926. About 1938 another will was known to have been duly executed but no copy was available, as the solicitor's records had been destroyed by enemy action during the war. The solicitor remembered drafting the will but had no recollection of its terms. Karminski, J., held that he would assume, from the usual course followed by solicitors, that the 1938 will revoked the 1926 will, and he therefore refused probate of the 1926 will. There was no decision as to probate of the later will.

(Theobald 45.)

General and specific legacies—interest.—Re Hall, [1951] W.N. 231. In this case a testator left a number of legacies of shares in companies. The will did not refer to the fact that the testator meant those shares, in particular, which he owned already, though in fact he owned a sufficient amount of such shares to satisfy all the legacies. It was therefore held that each legacy was general and not specific. There had been a delay in distribution, during which time the shares had earned more than 4 per cent. Danckwerts, J., held that only 4 per cent. interest could be claimed by the legatees from the end of the executor's year until the date of actual appropriation of the testator's shares to satisfy the legacies. The appropriation could not be treated as retrospective.

(Theobald 113, 130, 140.)

Particular bequest in common followed by remainder in common—issue take ancestor's share.—McDonnell v. *Neil,* [1951] W.N. 175. A residuary devise and bequest was made to Grace and Emily in equal shares for life, with remainder absolutely to their issue in equal shares, grandchildren, if any, taking *per stirpes.* The question

was whether the remainder was to be divided equally among all children of Grace or Emily as a single class, or whether the property was to be deemed severed into two moieties from the beginning, each set of children taking their parent's share. The Judicial Committee adopted the latter construction. Emily's daughter took the whole of Emily's moiety on Emily's death, and Grace's moiety went on Grace's death to her two surviving children and the issue of a deceased third child. *Re Hutchinson* (1882), 21 Ch. D. 811, was applied.

(Theobald 232.)

Will—construction—date of ascertainment of class.—Re Bleckly, [1951] 1 All E. R. 1064; 1 T. L. R. 902. The Court of Appeal have reversed Harman, J., and, recognising the strictures on the rule in *Andrews* v. *Partington*, wish to apply it consistently to all cases logically attracting its operation.

(Theobald 235; 15 Conveyancer 124.)

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5. *LANDLORD AND TENANT CASES*

By J. MUIR WATT, M.A., of the Inner Temple, Barrister-at-Law

Rent Restrictions Acts—Landlord and Tenant (Rent Control) Act, 1949—*sub-tenancy with sharing of kitchen—position of sub-tenant when order for possession made against the tenant.—Stanley* v. *Compton*, [1951] 1 All E. R. 859, is a case which is in principle indistinguishable from *Shackleton* v. *Greenhalgh*, [1950] 2 All E. R. 1223, discussed in these Notes for January–February, 1951 (p. 58). The main interest of the later case is that the sub-tenant tried unsuccessfully certain arguments which had not been put forward in the earlier one. The facts were that the tenant of a controlled flat sub-let a room, the sub-tenant having the use of the kitchen in common with the tenant. The landlord obtained an order for possession against the tenant and the question was whether the sub-tenant had any protection against the landlord. It was held that he had not. The decision makes the following points clear:—

1. Section 9 of the Landlord and Tenant (Rent Control) Act, 1949, afforded the sub-tenant no protection. As was held in *Shackleton* v. *Greenhalgh*, it only protects the tenant against the landlord where the tenant has sub-let on a sharing basis. It does not protect the sub-tenant himself once the tenancy ceases.
2. Section 15 (3) of the 1920 Act afforded the sub-tenant no protection, since it only applies where the premises sub-let are a "dwelling-house" within the Rent Restrictions Acts. Here they were not, by reason of the sharing of the kitchen.
3. Section 8 (1) of the 1949 Act afforded the sub-tenant no protection, since, once the tenant's interest had ceased, the

landlord was entitled to use the kitchen himself in common with the sub-tenant. The case was not, therefore, one in which the sub-tenant was entitled to the use of the kitchen "in common with another person . . . not being or including the landlord". (This answer accepts for the sake of argument the assumption that the sub-tenant remained lawfully in possession after the tenant's interest determined.)

(Rent Restrictions Guide, 3rd ed., pp. 27–29.)

Rent Restrictions Acts—"member of the tenant's family" under s. 12 (1) (*g*) *of* 1920 *Act—"unmarried husband"—effect of existence of child of irregular union.—Perry* v. *Dembowski,* [1951] W. N. 248, deals with a point which was left open in *Gammans* v. *Ekins,* [1950] 2 K. B. 328. In the latter case it was held that an "unmarried husband" was not a member of the deceased statutory tenant's family within s. 12 (1) (*g*) of the 1920 Act, so as to be able to claim a transmitted statutory tenancy. The question was reserved as to whether the existence of a child or children of the union would have made any difference. In *Perry* v. *Dembowski* there was a child of the union. The Court of Appeal held, however, that the existence of a child was not sufficient by itself. There must be evidence that the "unmarried husband" has taken some active steps either to adopt the child legally or to give permanence to a *de facto* adoption, before he can be treated as a member of the deceased tenant's family. The essence of the decision seems to be that to qualify as a member of the family through his relationship to his illegitimate child he must have given evidence of an intention to endow the relationship with that stability and permanence which characterise the family as distinct from mere casual connections.

(Rent Restrictions Guide, 3rd ed., p. 84.)

Lease by estoppel—limitation of doctrine that the subsequent acquisition of reversion will support the lease—rights of mortgagees.— The chief interest of *Coventry Permanent Economic Building Society* v. *Jones,* [1951] 1 All E. R. 901, from the point of view of the law of landlord and tenant, was the limitation placed by Harman, J., upon the time-honoured doctrine that, to quote *Woodfall,* "if a lessor by estoppel subsequently acquires an actual reversion in interest (as by purchasing the lands leased), the lease becomes a lease in interest and is then as good and unavoidable as if that reversion in interest had been vested in the lessor at the time the lease was made". A person who had entered into a contract to purchase a dwelling-house agreed to grant a tenancy of a flat therein. At that time, not having any more than an equitable interest herself, she could not create a legal tenancy. Later, but before completion of the purchase, she was given possession and let the person to whom she had agreed to grant the tenancy into possession of the flat. The purchase was then completed and simultaneously, in order to raise the money for the purchase, the property was mortgaged to a building society. The building society

was ignorant of the agreement to grant the tenancy and the mortgage excluded the mortgagor's statutory power to grant leases. Harman, J., rejected the argument that there was a tenancy by estoppel, which was converted into a proper tenancy when the conveyance was executed, so as to give occupants of the flat an interest in priority to the building society's mortgage. There was no *scintilla temporis* between the conveyance and the mortgage which enabled the tenancy by estoppel to become effective in precedence to the mortgage and so defeat the mortgagees' rights. There was only an " estate contract ", which, being unregistered, was void against the building society. Harman, J., also held that s. 14 of the Law of Property Act, 1925, which he described as " obscure enough ", did not help the occupants of the flat.

(Woodfall, 24th ed., p. 14.)

Agricultural Holdings Act, 1948—*landlord's power to resume possession without giving notice invalid as depriving tenant of rights to claim compensation.*—The main interest of *Coates* v. *Diment,* [1951] 1 All E. R. 890, is that it shows that the rule in *Re Disraeli's Agreement,* [1939] Ch. 382, applies as fully under the Agricultural Holdings Act, 1948, as it did under the Agricultural Holdings Act, 1923. The rule is that a clause in an agricultural tenancy agreement which purports to give the landlord power to re-enter without notice is invalid since such a clause would prevent the tenant from serving the statutory notices which are required to enable him to claim the increased compensation for disturbance under s. 34 (2), or the compensation for high farming under s. 56 (1) of the 1948 Act. The tenant has to give a notice not less than one month before the termination of the tenancy as a condition precedent to making these claims. If the landlord could put an end to the tenancy without notice he could deprive the tenant of the possibility of putting forward these claims. This is contrary to s. 65 of the 1948 Act, just as it was contrary to s. 50 of the 1923 Act. The draftsman of agricultural tenancy agreements should take note. Clauses which provide for resumption without notice are void, as are clauses which provide for a length of notice which will not give the tenant the chance of serving notices under s. 34 (2) or s. 56 (1), should he wish to do so. It is advisable to provide, say, for two or three months' notice.

There are other points of some interest in the case, such as the effect of the repeal of the 1923 Act upon a clause rendered void by that Act, the scope of the *ejusdem generis* rule, and the effect of Regulation 7 of the Agriculture (Control of Notices to Quit) Regulations, 1948. Practitioners who are called upon to deal with agricultural tenancies will find the case well worthy of study in detail.

(Jackson's Agricultural Holdings, 10th ed., pp. 152, 157, 185.)

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6. *REVENUE CASES*

By Desmond Miller, of the Inner Temple, Barrister-at-Law

(a) Income Tax

Yates v. *Starkey*, [1951] 1 All E. R. 732; [1951] T. R. 39 (C. A.).

(1) *Statutory provisions*: Section 21 (9) (*b*) and (*c*), the Finance Act, 1936.

(2) *Point*: (i) The terms "settlor" and "settlement" in section 21 of the Finance Act, 1936, are to be read and construed in accordance with the definitions contained in subsection (9) *ibid.*

(ii) When so read the term "settlor" includes any person who has provided funds for the purpose of settlement.

(iii) *Ex hypothesi* it matters not that such provision is made under compulsion (in this case an order of the Court).

(3) *Facts and Decision*: The marriage of the respondent Starkey and his wife was dissolved by decree made absolute on December 10, 1945, the custody of the three children being committed to the wife.

By order in the divorce proceedings it was ordered that the husband "do pay to the petitioner (the wife) . . . the annual sum of £100 less tax in trust for each of the three children . . . respondent to claim child allowances".

The husband duly paid these annual sums (in respect of each child), less tax, and the wife claimed and obtained repayment of tax on the children's behalf, on the footing that the effect of the order was to make such annual sums income of the respective children.

The husband claimed child allowance, but the claim was refused on the ground that each child—by force of the order—possessed an income in its own right in excess of the amount permitted by section 21 (3) of the Finance Act, 1920 (as amended).

On appeal the taxpayer (Starkey) contended:—

(i) that the Court had no power under sections 190 and 193 of the Supreme Court of Judicature (Consolidation) Act, 1925, as amended by section 10 of the Matrimonial Causes Act, 1937, to create a trust in favour of the children, alternatively;

(ii) if effective to create a trust the order was a "settlement" and the taxpayer a "settlor" within the meaning of section 21 of the Finance Act, 1936. In the result sums paid pursuant to the order must be treated as income of the taxpayer (and not of the children), by force of the provisions of section 21, *supra*.

It was conceded by the taxpayer before the Court of Appeal that the order made was binding *inter partes* and accordingly must be treated as validly made, for the purpose of the appeal.

The Crown maintained, on the alternative point, that the essential characteristics underlying the words settlor and settlement, were those of free will, *i.e.*, that there must be an obligation voluntarily undertaken, and that these characteristics were not displaced by the definitive provisions of section 21 (9) (*b*) and (*c*) of the Finance Act, 1936.

Held (affirming the decision of the Commissioners and Vaisey, J., on this point):—

(i) the order of the Court created a trust and in consequence a "settlement" as defined by section 21 (9) (*b*), the Finance Act, 1936;

(ii) the taxpayer as a person who had provided funds for the purpose of the settlement was a "settlor" as defined by section 21 (9) (*c*), the Finance Act, 1936;

(iii) the income arising under the settlement fell to be treated as the settlor's income pursuant to section 21, *supra*, and he was accordingly entitled to the relief claimed.

Obiter: The Court doubted the power to create a trust under section 193 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925 (as amended); *dicta* of Clauson, L.J., in *Stevens* v. *Tirard*, 23 T. C. 321 (at pp. 329–30), approved.

Littman v. *Barron*, [1951] 1 All E. R. 701; [1951] T. R. 23 (Ch. D.)

(1) *Statutory provisions*: Section 27 (1), the Finance Act, 1927; section 15 (1), the Finance Act, 1940.

(2) *Point*: The excess charged under section 15 (1), *supra*, is not a "profit" within section 27 (1) of the Finance Act, 1927.

(3) *Facts and Decision*: The taxpayer, a dealer in property, held a number of leasehold properties which he sub-let.

The majority were let at excess rents and assessment on the excess was made pursuant to section 15 (1) of the Finance Act, 1940. As regards the remaining properties the taxpayer claimed to have suffered a loss in that two were let at a rent less than that paid by him, and in respect of three he received no rents.

The taxpayer claimed that as regards the loss on these five properties he was entitled to rely on section 27 (1) of the Finance Act, 1927, and by force of its provisions to set off the amount of the loss against the excess of rent assessed.

The section is expressed to apply (*vide* subsection (1), *ibid.*) where a person sustains a loss,

> "of such nature that, if any profits had arisen therefrom, he would have been liable to be assessed in respect thereof under Case VI of Schedule D . . .".

Held (affirming the Special Commissioners' determination), that the subject of charge in section 15 (1), *supra*, namely the "excess" was not equivalent to the word "profits" in section 27 (1), *supra*. The appeal therefore failed.

Bury & Walkers v. *Phillips*, [1951] T. R. 17 (Ch. D.).

(1) *Statutory provisions*: Rule (3) (*a*) of the Rules applicable to Cases I and II of Schedule D, the Income Tax Act, 1918.

(2) *Point*: *Prima facie* the lending of money does not form part of the profession of solicitor.

C. I. R. v. *Hagart & Burn-Murdoch*, 14 T. C. 433, applied.

(3) *Facts and Decision*: The appellant taxpayers carried on the profession of solicitors. It was affirmatively established that since 1890 the firm had made a practice of advancing money to persons who desired to purchase land with a view to building houses thereon. The practice had become generally known in the district and numerous builders took advantage of it, of these builders some were previous clients of the firm, some not.

In addition the firm loaned money on mortgage or other security to persons other than builders, most, but not all of whom were existing clients, and generally by way of temporary finance in connection with house purchase.

The appellants claimed to deduct estimated sums by way of entertainment expenses incurred by reference to money lending activities.

No evidence was adduced to establish that there existed a practice prevalent among solicitors either of making advances or of incurring entertainment expenses of the nature in point.

Held (affirming the determination of the Special Commissioners), in the absence of proof of such a custom or alternatively of a special finding of fact to the like effect;

(i) that the making of advances was not a separate business carried on by the appellants;

(ii) that the making of advances did not form part of the appellants' profession of solicitors;

(iii) that the expenses were not therefore incurred wholly and exclusively for the purpose of the appellants' profession or trade.

Owen & Gadsdon v. *Brock*, [1951] T. R. 21 (Ch. D.).

(1) *Statutory provisions*: Rule 3 (*a*) and (*f*) of the Rules applicable to Cases I and II of Schedule D, the Income Tax Act, 1918.

(2) *Point*: the fact that expenditure upon the purchase of a house (by a firm of solicitors), first, was incurred solely for the purpose of retaining the services of an employee, and secondly, was a temporary expedient only pending the completion of another house then in building, does not alter the capital nature of such a disbursement.

Rellim, Ltd. v. *Vise*, [1951] T. R. 27 (Ch. D.).

(1) *Statutory provisions*: Case I, Schedule D, the Income Tax Act, 1918.

(2) *Point*: The decision is important as illustrating the extent to which the Commissioners' finding on issues of fact is binding on the Court.

(Note how an investment company accepted as such by the Revenue, may lose this character by engaging in activities of trade,

and cf. the observations of the Lord President in *C. I. R.* v. *Hyndland Investment Co., Ltd.*, 14 T. C. 694, at p. 699 :—

" the question is not what business does the taxpayer *profess* to carry on, but what business does he *actually* carry on ".)

Owen v. *Sassoon*, [1951] T. R. 49 (Ch. D.).

(1) *Statutory provisions*: Rule 2 (*d*) of Schedule C; Case I of Schedule D, the Income Tax Act, 1918; sections 21 (1) and 60 (1), the Finance Act, 1940.

(2) *Point*: Income arising from securities deposited with Lloyd's as a condition precedent to becoming a member must be brought into the Case I assessment.

Murray v. *C. I. R.*, [1951] T. R. 61 (C. S.).

(1) *Statutory provisions*: Case I, Schedule D, the Income Tax Act, 1918.

(2) *Point*: Sums received by a timber merchant for the sale of his *right* to cut standing timber are—as one might think—receipts of his trade.

The decision illustrates that motive of sale, in this instance pressure by a mortgagee bank, is immaterial, if the operation is in the nature of trade.

Albion Rovers Football Club, Ltd. v. *C. I. R.*, [1951] T. R. 63 (C. S.).

(1) *Statutory Provisions*: Case I, Schedule D, the Income Tax Act, 1918.

(2) *Point*: The specialties of contract *inter partes* entitled the appellant taxpayers to deduct sums in fact paid for services rendered after the close of their accounting period, as an expense of that period.

MacMahon v. *C. I. R.*, [1951] T. R. 67 (C. S.).

(1) *Statutory provisions*: Case I, Schedule D, the Income Tax Act, 1918.

(2) *Point*: A decision on its facts. In considering whether the purchase and sale of house property during a limited period is an operation of trade the fact of interim residence by the taxpayer is a material factor.

C. I. R. v. *Niddrie and Benhar Coal Co., Ltd.*, [1951] T. R. 69 (C. S.).

(1) *Statutory provisions*: Rule 3 (*a*) of the Rules applicable to Cases I and II of Schedule D, the Income Tax Act, 1918.

(2) *Point*: Agreed that a sum paid to secure release from a liability under contract may be a disbursement on revenue account. In this case, however, the Court overrode the Commissioners' determination on the ground that there was no evidence before the Commissioners to justify a finding that any sum had been so paid.

(b) Profits Tax

C. I. R. v. *Silverts, Ltd.*, [1951] 1 All E. R. 703; [1951] T. R. 31 (C. A.).

(1) *Statutory provisions*: Paragraph 11 of the Fourth Schedule to the Finance Act, 1937.

(2) *Point*: For the purpose of determining the issue of "control" in this context the Court cannot look beyond the share register, except in the case of nominee holdings, *i.e.*, where the registered holder is a bare trustee.

C. I. R. v. *J. Bibby & Sons, Ltd.*, 29 T. C. 167, explained and distinguished from *British American Tobacco Co., Ltd.* v. *C. I. R.*, 29 T. C. 49.

(3) *Facts and Decision*: At all material times the issued share capital of the appellants consisted in 6,000 A shares, 6,000 B shares and 2,000 C shares. The C shares conferred no voting rights, the A and B shares equal voting rights.

The B shares were held by one director, the A shares were the subject of settlement, under the terms of which:—

(i) the sole beneficiary was an infant;

(ii) a bank (registered as holder of the shares) was appointed custodian trustee within the meaning of the Public Trustee Act, 1906;

(iii) two directors, other than the holder of the B shares, were appointed managing trustees.

The appellants contended that the company was not one "the directors whereof had a controlling interest therein" and in consequence the restrictions contained in paragraph 11 of the Fourth Schedule to the Finance Act, 1937, regarding the deduction of directors' remuneration in computing the company's profits for profits tax purposes, did not apply.

The case for the appellants rested on two submissions:—

(i) that a custodian trustee cannot be a bare trustee in that by force of section 4 of the Public Trustee Act, 1906, he is not bound in all circumstances to give effect to the directions of the managing trustees;

(ii) that except in the case of a bare trustee, it is not permissible to look beyond the share register.

Held (affirming the determination of the Special Commissioners and reversing the decision of Romer, J.), that the custodian trustee (the bank) was not a bare trustee and in consequence must be regarded as possessing full voting rights as registered holder of the A shares. Therefore the appellant company was not "director controlled".

(Leave to appeal to the House of Lords granted.)

Re A. D. Fraser, Ltd., [1951] T. R. 73 (C. A.).

(1) *Statutory provisions*: Section 36 (1), the Finance Act, 1947; sections 67 and 68, the Companies Act, 1948.

(2) *Point*: This case will no doubt receive full treatment in the sphere of company law. It suffices for present purposes to note that although (apparently) no question as to the interests of creditors or as to the rights of shareholders *inter se*, arose, the Court of Session (by majority decision) refused to confirm a reduction of capital on the ground that the sole object of the reduction was the avoidance of taxation. From this decision the Lord President (Lord Cooper) dissented in a forceful and convincing judgment.

Ex p. Westburn Sugar Refineries, Ltd., [1951] 1 All E. R. 881 (H. L.).

(1) *Statutory provisions*: Section 66 (1) (*c*), the Companies Act, 1948.

(2) *Point*: The view of the House of Lords upon the considerations which are to be taken into account by a Court in exercising its statutory discretion to confirm a reduction in capital appears to accord with that of the Lord President (diss.) in *Re A. D. Fraser, Ltd, supra*, cf. *per* Lord Radcliffe, at p. 887.

(c) Estate Duty

Sharp's Trustees v. *Lord Advocate*, [1951] T. R. 81 (C. S.).

(1) *Statutory provisions*: Section 2, the Married Women's Policies of Assurance (Scotland) Act, 1880; section 4, the Finance Act, 1894.

(2) *Point*: The word "interest" in the proviso to section 4 of the Finance Act, 1894, is to be widely construed. In consequence a policy of assurance effected under section 2 of the Married Women's Policies of Assurance (Scotland) Act, 1880, by a husband in favour of his wife which reserved the benefit of the policy to the husband's executors or assignees in the event of the wife predeceasing him, was not property in which the husband "never had an interest" within section 4, *supra*.

(3) *Facts and Decision*: A husband effected two policies of assurance on his life. The policies were nominated in favour of his wife pursuant to section 2 of the Married Women's Policies of Assurance (Scotland) Act, 1880, "whom failing the executor and assignees whomsoever" of the assured. In the event the assured was survived by his widow but the Crown claimed duty at his death upon the basis that the reservation of a contingent benefit to the deceased assured's executors and assigns excluded the operation of the proviso to section 4 of the Finance Act, 1894, and as a consequence the policy moneys fell to be aggregated with the deceased's other estate for the purpose of computing the rate of duty applicable.

Held (Lord Mackay diss.): (i) the reservation in favour of the deceased's executors and assigns was an "interest"; (ii) the policy moneys must therefore be aggregated with the deceased's remaining estate.

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7. *FAMILY LAW CASES*

By C. E. P. Davies, M.A., B.C.L., of the Inner Temple, Barrister-at-Law

Maintenance—Matrimonial Causes Act, 1950, *s.* 23—*reasonable maintenance.*—In *Scott* v. *Scott,* [1951] P. 245, a wife applied under s. 23 of the Matrimonial Causes Act, 1950, for an order for periodical payments on the ground of her husband's failure to provide reasonable maintenance. The parties had separated (according to the wife, on account of her husband's cruelty, which he denied) and the husband had been paying his wife £10 a week since the parting. The wife now claimed that this amount failed to be reasonable maintenance because it was unsecured by order of the Court and not certain to continue. Hodson, J., refused to accept this submission, pointing out that if the wife had left her husband on account of his cruelty she could have taken proceedings against him for judicial separation or divorce in which alimony *pendente lite* and permanent alimony or maintenance could have been obtained. He applied the test of reasonableness having regard to the standard of life which the parties had previously maintained and held that reasonable maintenance had been provided. Wallington, J., had previously refused an application by the wife for an injunction *quia timet* to restrain the husband from removing any of his assets out of the jurisdiction of the court and his refusal was upheld on appeal (*Scott* v. *Scott,* [1951] P. 193) on the ground that this remedy could not be used until some right to relief had been established. The Judicature Act, 1925, s. 45, enabling the High Court to grant an injunction in all cases in which it appeared to the Court just and convenient so to do was prayed in aid, but was considered not to have given the Court any enlarged jurisdiction in this respect.

Maintenance—Matrimonial Causes Act, 1950, *s.* 23—*previous petition for divorce on ground of wife's alleged adultery dismissed—husband's belief that wife guilty of adultery.*—In *Allen* v. *Allen,* [1951] 1 All E. R. 724, the question for decision was whether the rule in *Glenister* v. *Glenister,* [1945] P. 30, that reasonable belief by a husband that his wife had committed adultery was a defence to proceedings for desertion, was applicable in proceedings by a wife for maintenance under the Matrimonial Causes Act, 1950, s. 23, notwithstanding that a previous petition by the husband for divorce on the ground of his wife's adultery had failed. It was contended for the husband that, though the petition for divorce had been dismissed, the

Judge did not expressly exculpate the wife, which might justify continuance of the husband's belief that she had committed adultery. The Court considered that in this case the decision of the Court in the divorce proceedings must be regarded as conclusive, but expressly reserved any opinion upon the possibility of an exception where in the previous divorce proceedings a technical rule of evidence might have excluded from the Court some information upon which the husband's belief was based.

Maintenance—Matrimonial Causes Act, 1950, *s.* 23—*departure by wife from matrimonial home—petitions by husband and wife for divorce on ground of cruelty dismissed—offer by wife to resume cohabitation without expressing repentance—whether bona fide.—Price* v. *Price,* [1951] 1 All E. R. 877. A wife who had left the matrimonial home petitioned for divorce, and her husband cross-petitioned on the ground of cruelty. Both petitions were dismissed. Shortly afterwards the wife wrote to her husband through her solicitors saying that "good will and a *bona fide* desire by both parties to forget and forgive might save this marriage yet" and that she would return to him provided that neither of their mothers would visit them. This offer was refused. The wife now applied for maintenance under s. 23 of the Matrimonial Causes Act, 1950, and her husband resisted the application on the ground that the wife was still in desertion as it was not sufficient to terminate the desertion for her merely to offer to return; the offer to be *bona fide* must be accompanied by expressions of repentance and contrition. To support this *Thomas* v. *Thomas,* [1924] P. 194, was relied upon, where, however, it had been held on the facts that even a husband's expression of repentance did not terminate constructive desertion caused by a long series of acts of insult and cruelty towards his wife followed ultimately by her expulsion from the matrimonial home. But Pilcher, J., pointed out that *Thomas* was a case of constructive desertion where special considerations obtained and did not apply to simple desertion. In any event the words quoted above from the letter of the wife's solicitors were considered by the Court sufficient to show repentance and contrition.

Maintenance—agreement by divorced husband to pay his wife annual amount—consideration.—Combe v. *Combe,* [1951] 1 All E. R. 767. A wife brought an action in the King's Bench Division upon an undertaking embodied in a letter written by her husband's solicitors after she had obtained a decree *nisi* of divorce against him agreeing to pay her £100 a year. Byrne, J., decided that there was no consideration for the husband's promise (see *Gaisberg* v. *Storr,* [1950] 1 K. B. 107), but also that the husband's undertaking was enforceable upon the principle of the *High Trees Case,* [1947] K. B. 130 and *Robertson* v. *Minister of Pensions,* [1949] 1 K. B. 227, as an unequivocal acceptance of liability, intended to be binding, intended to be acted on, and in fact acted on. The husband appealed. The

Court of Appeal first pointed out that the *High Trees Case* " does not create new causes of action where none existed before. It only prevents a party from insisting on his strict legal rights when it would be unjust to allow him to do so having regard to the dealings which have taken place between the parties " (Denning, L.J., at p. 769), and held that this principle did not apply in the present case. It was also decided, following *Gaisberg* v. *Storr,* that the consideration for the husband's undertaking could not be any express or implied promise by the wife to forbear from applying for maintenance because, notwithstanding her promise, she could always apply. Finally it was held that there was no consideration in the wife's actual forbearance to apply for maintenance because her forbearance was not made on the faith of the husband's undertaking or at his request.

Maintenance—cruelty—callous conduct of husband endangering wife's health—absence of proved intention to injure—presumption that natural consequences of acts intended.—In *Simpson* v. *Simpson,* [1951] 1 All E. R. 955, a husband had for a considerable time been guilty of callous conduct towards his wife which included (among other things) keeping her short of money, buying food for himself but not for her, refusing to take her either for a holiday or out in his new car, staying away from home until late at night, and not going to see her when she was ill. The magistrates considered that these acts amounted to cruelty and made an order for maintenance against the husband, from which he appealed. It was admitted that the husband foresaw that his conduct might possibly injure his wife's health, but the argument on his behalf was that his conduct came short of legal cruelty because he did not intend that her health should suffer. In this connection the analogy of *Hosegood* v. *Hosegood* (1950), 66 T. L. R. 735, was relied upon, where Denning, L.J., decided that there could be no constructive desertion unless the party whose conduct was complained of had in fact an intention to bring the marriage to an end. But the Divisional Court upheld the decision of the magistrates on the ground that the husband's conduct could fairly be regarded as ill-treatment and that in such a case the principle that a man must be taken to intend the natural consequences of his acts was applicable, though not as an irrebuttable presumption of law. The Divisional Court also considered that conduct such as this, if sufficiently grave, could be considered to be " aimed at " the wife within the interpretation of that expression given in *Kaslefsky* v. *Kaslefsky,* [1951] P. 38 (see *The Conveyancer,* Vol. 14, pp. 316 and 317). Upon this view of the case, if the reasoning of Denning, L.J., in *Kaslefsky* is accepted, it would seem that legal cruelty might be established without any proof of intention to injure. Much of the judgment in *Simpson* is devoted to criticism of the case of *Hosegood* but it may be that considerations applicable in cases of constructive desertion do not necessarily obtain in cases of cruelty.

Legitimation—child born before annulment of parents' marriage—legitimation by subsequent marriage.—The problem which Danckwerts, J., had to solve in *Re Adams,* [1951] 1 All E. R. 1037, was whether a child might be the legitimate issue of different fathers. Husband and wife were married in 1937 but separated in 1938. Subsequently three children were born to the wife, the birth of the first being registered in the name of the man who was not her husband and the births of the other two children being registered without naming the father. In 1947 the marriage was annulled on the ground of the husband's incapacity and shortly afterwards the wife married the man in whose name the birth of the first child had been registered and the births of the three children were re-registered under the Legitimacy Act, 1926, as the children of the wife and her second husband. *Newbould* v. *Att.-Gen.,* [1931] P. 75, had decided that for the purpose of the Act a decree of annulment for incapacity operated retrospectively and that a marriage so annulled was not a marriage to a third person subsisting at the date of a child's birth which would prevent the child from being legitimated by the subsequent marriage of its parents; therefore in the present case the children had apparently been legitimated. But, on the other hand, the effect of the Law Reform (Miscellaneous Provisions) Act, 1949, s. 4, was that the children of any voidable marriage subsequently declared null who would have been legitimate if the marriage had been dissolved should be deemed legitimate notwithstanding the annulment, a principle which had previously applied only to certain voidable marriages (see Matrimonial Causes Act, 1937, s. 7 (2)), and on this ground it was suggested that the children were the legitimate issue of the wife and her first husband. Two solutions of the dilemma were given. First it was decided that the Law Reform (Miscellaneous Provisions) Act, 1949, did not apply retrospectively. But, lest similar difficulties might arise after 1949, Danckwerts, J., also pointed out that the 1949 Act only declared to be legitimate the children of a voidable marriage who would have been legitimate if the marriage had been dissolved and that if the present case had been one of divorce the children would not have been the legitimate children of the wife and her first husband.

THE LIBRARY

The Rent Acts. Sixth edition. By R. E. Megarry, M.A., LL.B., Barrister-at-Law. London: Stevens & Sons, Ltd. 1951. lxxvi and 635 pp. (£2 11s.)

The increase in the bulk of the sixth edition of *Megarry* as compared with the fifth, which is at first a little frightening, is partly due to the addition of 169 pages (ignoring the index) and partly due to the use of thicker paper. If the book continues to grow at this rate (the fifth edition added 150 pages to the fourth) perhaps the publishers will consider bringing out a thin paper edition. They will thereby earn the gratitude of those who read *Megarry* systematically in buses and trains and who find this tendency to grow to the stature of *Woodfall* dismaying. The growth is mainly the result of new case law, no new statute having in the meantime further complicated the situation. If the Leasehold Property (Temporary Provisions) Bill becomes law in anything like its form at the moment of writing, however, the next edition will have to take account of statutory modifications of the law as laid down in *Knightsbridge Estates Trust, Ltd.* v. *Deeley,* [1950] 2 K. B. 228, and possibly *Cow* v. *Casey,* [1949] 1 K. B. 474.

It is hardly necessary to say more than that the sixth edition of *Megarry* maintains the high standard of accuracy, scholarship, completeness and lucidity which has already made the book a classic and won the confidence of the Bench (as shown by the adoption of various statements of principle by the Court of Appeal). The author has rewritten a number of passages where recent decisions or the result of his own further reflection have appeared to require it. This is not to say that his original statements were incorrect or incomplete, but merely that the development of his own thoughts on the subject have led him to seek continually to improve the quality of his exposition.

No practitioner who deals with Rent Acts problems can afford to do without the sixth edition of *Megarry.* In its clear and pleasant literary style, its sound and comprehensive learning (the footnotes alone contain a mass of valuable comment) and its bold and skilful handling of a formidable array of authority, this is a textbook of rare distinction. *O si sic omnes!*

J. M. W.

Rent Restrictions Cases: Cumulative Supplement, No. 2 to Second edition. By Lionel A. Blundell, LL.M. and V. G. Wellings, M.A., Barristers-at-Law. London: Sweet & Maxwell, Ltd., and The Estates Gazette, Ltd. (15s.)

A new edition of Blundell's *Supplement* is always welcome. Litigants continue to enrich this branch of our jurisprudence with never-failing public spirit. Incidentally, surely a debt of gratitude is owed to the Langford Property Co., Ltd., for the number of leading cases which it has added to the law on this subject. As always, this useful work has been carefully and skilfully done. The cases are "potted" to the right extent and the annotations should put practitioners on the track of helpful (or adverse) authority. Among other matters of interest those who have not studied in detail the

House of Lords speeches in *Baker* v. *Turner*, [1950] A. C. 401, will have their attention drawn to the fact that the doctrine of *Neale* v. *Del Soto* is still open to review in that House. Unfortunately, *Shackleton* v. *Greenhalgh*, [1950] 2 All E. R. 1223, now followed in *Stanley* v. *Compton*, [1951] 1 All E. R. 859, was decided too late for inclusion in the *Supplement*, which takes the story down as far as October 1, 1950. The *Supplement* is cumulative and therefore supersedes the previous one. Together with the main volume of *Cases* it constitutes an indispensable part of a practitioner's equipment.

J. M. W.

Practical Points on Planning Law. Edited by HAROLD J. BROWN, LL.M., D.P.A., L.A.M.T.P.I. London: Sweet & Maxwell, Ltd. 1951. (15s.)

The use of the technique of question and answer for the imparting of instruction and entertainment has been of growing significance in recent years and has not been uninfluenced by the radio. Lawyers need not, however, ascribe it to this, for one contemporary legal periodical has carried a series of practical points since 1838, and published a series of selections going back to 1877. Moreover many practitioners will have followed with affection from their student days the entertaining dialogues under the heading of "Interviews with Worldly Solicitor". The present work, confined as it is to the law and practice relating to Town and Country Planning, will be especially welcome consisting as it does of some 284 questions which have been submitted by subscribers to the *Journal of Planning Law* and the appropriate answers. More than two-thirds of the questions have not previously been published.

The work therefore represents the accumulated experience of many legal practitioners and surveyors in daily contact with the practical problems of the administration of the Town and Country Planning Act and regulations. The authors have done a real service to the profession in helping to lead the way through the labyrinthine paths of the present planning code.

When the work is read as a whole some idea is gained of the immense range and diversity of current planning law and practice and the complexity of the subject—the question and answer relating to a roadside stall for the sale of strawberries occupied some thirty-five lines. But the chief and lasting value of the work will be as a handy work of reference. To this end, the book is conveniently arranged under suitable headings and an index is provided. A point which might be considered by the editor and publishers for future series of such practical points is the provision of a table of statutes and statutory instruments referred to, so as to facilitate reference and to enable a note to be made when any sections or regulations are amended or revoked.

Owing to the nature of the work, consisting as it does of genuine questions submitted to the journal it cannot claim to have a very even literary style However, the authors have not lost their sense of humour which is illustrated by the remark in question 18, namely "If a trailer kiosk is a building because it has a roof, demolition orders should be served whenever there is a traffic jam". Moreover, in Point number 29 when advising on the exclusion of pet animals from class 1 of the Use Classes Order, and considering gold fish, the learned author says "in any case I should not regard fish as 'pets' which would seem to require a possibility of some degree of reciprocal affection". Again, the learned author is compelled to take a worm's eye view when asked whether the extension of a floor below ground could be said to be an external alteration—a problem which, unhappily, may be one of growing importance at the present time. Indeed considering the skill and ingenuity displayed in some of the answers, one is tempted to wonder how

the authors would have dealt with the truly Shavian situation which has recently arisen at Ayot St. Lawrence.

The book can therefore be assured of a ready welcome by those whose task it is to apply the Planning Acts to individual practical problems.

R. N. H.

Hanson's Death Duties. Ninth edition. Fourth Cumulative Supplement. London: Sweet & Maxwell, Ltd. 1950. (15s. net.)

The present Supplement brings the annotations of the principal volume up to date, that is to December 13, 1950. It also incorporates, in so far as relevant, the text of the Finance Acts, 1946 to 1950, with the authors' notes.

As one would expect, the same degree of careful and objective analysis which has made *Hanson* the leading work on this subject is apparent in the Supplement. It does not derogate from its value to say, that the mere existence of a Fourth Supplement serves to stress two paramount needs, first, clarity in the drafting of these Acts, and secondly, codification—or something better.

D. M.

First Supplement to Emmet's Notes on Perusing Titles. Thirteenth edition. London: Solicitors' Law Stationery Society, Ltd. 1951. xv and 70 pp. (7s. 6d.)

In the thirteenth edition of the main work the law was stated as on October 12, 1948, in Vol. I and as on October 12, 1949, in Vol. II, and its Addenda. The Supplement carries the reader up to December 31, 1950, and in some cases rather beyond that date.

This reviewer has little but praise for the manner in which the Supplement has been prepared. Checking has not revealed any obvious oversight; and it is pleasing to note that the author has not hesitated to insert references to cases decided before the issue of the main work where he has concluded that those cases should have appeared in the main work.

It must be difficult for the writer of such a Supplement to decide what *dicta* in recent cases should be mentioned, and made the subject of comment. When read in isolation from the main work some of the comments on decisions may be misleading; but the reader must remember that the material (apart from the General Summary) is to be read as an addition to, or qualification of, the remarks at the page in the main work to which reference is made in the Supplement.

The summary of the effect of the provisions of the Finance Act, 1949, in connection with compulsory redemption of land tax, does not deal with the position of a lessee who was liable to pay land tax before compulsory redemption, a case which must frequently arise.

E. O. W.

Dymond's Death Duties. Eleventh edition. London: Solicitors' Law Stationery Society, Ltd. 1951. (£3 15s. net.)

Dymond's Death Duties has earned the reputation of being an invaluable day-to-day book of reference for the practitioner. It is pleasing to note that the eleventh edition by clarity of exposition and the use of practical example preserves this well-merited reputation.

The rules governing the charge of estate duty are to be found in an ill-assorted and, as yet, semi-digested agglomeration of statutes, and as a consequence brevity of treatment has its dangers as well as its advantages. The new *Dymond* seems to attain the best of both worlds as it makes full use of the abolition of the Legacy and Succession Duties considerably to expand the text relating to Estate Duty; in the result the practical tenor of the earlier editions is retained and the amplification of the text I refer to, can only serve to enhance its repute.

I would particularly single out for commendation those sections dealing with "controlled companies" and the valuation of their shares, pursuant to the Finance Act, 1940 (as amended). As an expression of opinion I consider that those sections dealing with discretionary trusts and trusts for accumulation, the subject-matter of charge in the case of gifts *inter vivos*, and the difficult question of nominated policies of assurance might be earmarked for further amplification in later editions

There is one point, however, upon which I wish to join issue with Mr. Dymond, and that is upon the use of the word "evasion" in his Preface. Such a word carries with it—to my mind—visions of fugitive offenders from justice, but it is used, apparently, by reference to arrangements of a legal character.

After all the majority of citizens of this country so arrange their affairs as to "evade" the commission of offence against the criminal law. Is this to be considered an anti-social practice?

D. M.

Buying and Selling a House. By M. BASIL EVANS, M.B.E., F.R.I.C.S., F.A.I., M.Inst.R.A. London: Stevens & Sons, Ltd. 1950. viii and 163 pp. (6s. 6d.)

This is another little book in the "This is the Law" series written primarily for the layman. This book, however, has the attraction that it is written from the angle of the estate agent and, as such, contains a variety of information outside the practice of the lawyer which is useful to have. It is well worth the expenditure of its very small price.